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In The

Supreme Court of the United States

October Term, 1996

JOHN M. HARNISH AND EVELYN M. HARNISH,
Petitioners

vs.

KEYSTONE FARM CREDIT,
Respondents

Petition for Writ of Certiorari to the
United States Court of Appeals for the
Third Circuit

PETITION FOR WRIT OF CERTIORARI

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106 pp

QUESTIONS PRESENTED:

Whether the actions of the Pennsylvania State Courts in holding that a Federal Statute, The Farm Credit Act (12 U.S.C. § 2201), cannot be incorporated by reference in a private mortgage agreement between private parties is an unconstitutional violation of the liberty to contract and unconstitutionally deprived the mortgagors of their property without due process of law.

LIST OF PARTIES

John M. Harnish and Evelyn M. Harnish, h/w and THE UNITED STATES OF AMERICA,

Petitioners

Keystone Farm Credit, ACA

Respondents

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NO.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW:

AND NOW, this 8th day of November, 1994, upon consideration of the motion for summary judgment filed on behalf of Keystone Farm Credit, ACA, the briefs filed by the parties and oral argument of counsel, it is hereby ORDERED that summary judgment be granted in favor of Keystone Farm Credit, ACA and against John M. Harnish and Evelyn M. Harnish, husband and wife, in each of the three cases captioned above. Judgment shall be entered as follows:

1. In civil action 3070-1990, in the amount of $34,837.01, with interest computed on a daily basis at the amount of $8.955 per day from November 1, 1993 until the date of payment of this amount;

2. In civil action 3071-1990, in the amount of $26,182.09, with interest computed on a daily basis at the amount of $3.256 per day from November 1, 1993 until the date of payment of this amount.

3. In civil action 3072-1990, in the amount of $982,909.38, with interest computed on a daily basis at the amount of $125.141 per day from November 1, 1993 until the date of payment of this amount.

This court finds there to be no genuine issue as to any material fact in this case and, therefore, summary judgment is appropriate under Pa.R.C.P. 1035. Plaintiff is entitled to judgment against John M. Harnish and Evelyn M. Harnish, husband and wife, as a matter of law. Judgment shall be entered in the amounts set forth above in favor of Keystone Farm Credit, ACA, and against John M. Harnish and Evelyn M. Harnish, husband and wife.

BY THE COURT

LAWRENCE F.STENGEL, JUDGE

STATEMENT OF JURISDICTION

The judgment o the Court of Common Pleas granting Summary Judgments for Plaintiff Mortgagees in three foreclosure actions was entered November 8, 1994. (App. E) The judgment of the Superior Court of the Commonwealth of Pennsylvania was entered on August 14, 1995 (App.F). The Per Curiam of the Supreme Court of the Commonwealth of Pennsylvania (App. G) denying Petitioners' Leave to Appeal was entered February 13, 1996. The jurisdiction of this court is invoked under upon Supreme Court Rule 10.1(a), (b) and (c), 28 U.S.C. § § 1331 and 1343 and pursuant to the U.S. Constitution Article VI, Section 1, Clause 2.

CONSTITUTIONAL PROVISIONS INVOLVED

Article IV, Section 2:

> The Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States.

Article VI Section I of the United States Constitution: The Supremacy Clause:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment I-Freedom of Religion, Speech and Press ; Peaceful Assemblage; Petition of Grievances:

> **Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.**

Article XIV: Fourteenth Amendment to the United States Constitution:

> **Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

STATUTORY PROVISIONS INVOLVED

Appendix I sets out relevant portions of the *Farm Credit Act, 12 U.S.C. §2201 et seq. As amended* (West Supplement 1995).

SUMMARY OF THE CASE

The petitioners John and Evelyn Harnish, are Pennsylvania dairy farmers. They own and operate a farm which has been in the Harnish family since 1909 and which they have farmed since 1964. The Harnishes are Defendants in three Commonwealth of Pennsylvania farm foreclosure actions in state courts. By and through their attorney David S. Brady, they respectfully request that a writ of certiorari issue to review the Orders of the Pennsylvania Supreme Court entered February 13, 1996 which denied petitioners' Allowance of Appeal and of the Pa Superior Court entered August 14, 1995 in the consolidated appeal of three foreclosure actions.

The respondent is Keystone Farm Credit ACA, (hereinafter KFCB) which is the successor of the Farm Credit Bank of Baltimore, previously known as the Federal Land Bank of Baltimore.

Harnishes and KFCB agreed in their mortgage contracts that the mortgages were expressly made subject to *The Farm Credit Act, 12 U.S.C. §2201 et seq. and all Acts amendatory thereof and supplementary thereto* (hereinafter FCA) and thus that the Act should be available to the parties as an enforceable provision in their written agreement. When Harnishes raised defenses relating to the FCA in their Answers and New Matter to KFCB's Complaints, the Pennsylvania Courts ruled that the FCA, standing alone does not create privately enforceable rights, based upon the line of cases which find no implied private right of action in farmers to enforce the Act.

In a first round of appeals in the matter through Pennsylvania Superior Court and for leave to Appeal to the Pennsylvania Supreme Court, the appeals courts sustained the trial court ruling which threw out all Harnish defenses. In that stage of the case, the courts had not noted or addressed the fact that the contracts expressly incorporated the FCA as the law of the agreement.

Thereafter, in Answers and New Matter to KFCB's Motions for Summary Judgment, Harnishes next raised the issue that the FCA was expressly incorporated in the mortgages in question and that KFCB was estopped from bringing foreclosure under the terms of the contract and the Act until they had complied with the FCA including notice of restructuring rights and various restructuring provisions, as necessary terms in the contract between the parties.

Harnishes filed affidavits averring the noncompliance of KFCB with the restructuring provisions of the FCA and failure to give notice of restructuring rights as part of the parties' contracts. In opinions of the trial court and Pennsylvania Superior Court and the Pennsylvania Supreme Court by denial of leave to appeal, all failed to acknowledge the issue making the FCA part of the parties' contract and granted and affirmed the grant of summary judgments for KFCB.

In its opinion filed with the Pennsylvania Superior Court after Harnishes appealed (Appendix D), the trial court held that Pennsylvania Rule of Civil Procedure 1032 precluded Harnishes from raising the issue under the 1987 Amendments to the FCA because under the terms of the state court rule, "...A party waives all defenses and objections

which are not presented either by preliminary objection, answer or reply ..." .

In other words, the state rules of pleading are construed by the court to preclude Harnishs from relying on the incorporation of the FCA in the parties' contracts because the issue was raised in Harnish's Affidavits and Answers to the Motions for Summary Judgment of Plaintiff and not before that in their original answers to KFCB's complaints.

The net effect of these rulings was to extend the interpretation that there is no implied private right of action in private parties to enforce the terms of the FCA to an interpretation that private parties are not free to expressly incorporate the FCA by reference in their private agreement. Private parties are thus precluded from making provisions of the FCA available to them as enforceable terms of their private contracts in any conflict between them.

Harnishs contend that these rulings by Pennsylvania State Courts are an unconstitutional denial of their private right and liberty to contract and a deprivation of their property without due process of law. If state courts are allowed to use orders granting summary judgment for mortgagees without trial in violation of constitutional rights of the mortgagors, when the mortgagors have raised legitimate contract issues expressly incorporating a federal statute, (the FCA) into the private parties' contract, then such state court rulings are unconstitutional.

STATEMENT OF THE CASE

Petitioners are farmers who farm lands which have been in their family since 1909. In 1988 they lost fifty cows in their herd due to a debilitating weakening of cows during calving. By affidavit in response to Plaintiff's Summary Judgment Motions, Petitioners specifically averred that by 1990 they had paid the Farm Credit Bank, plaintiffs herein over 1.3 million dollars on loans of $760,000. .

In the first phase of the three foreclosure suits in question, Petitioners Answered the Complaint and raised New Matter and certain affirmative defenses involving requirements imposed upon mortgagees, KFCB, Respondents herein, by the *Farm Credit Act of 1971, 12 U.S.C. §2201 et seq.*, (the FCA). Petitioners alleged that Respondents had violated the terms of the FCA by establishing interest rates without strictly adhering to the terms and provisions of such federal statute. Petitioners' Answer raised New Matter pertaining to the mortgagee's failure to utilize "call provisions" in the sale of Farm Credit Bank bonds" as required by the *Farm Credit Act of 1971, 12 U.S.C. §2201 et seq.* which refusal allegedly resulted in the mortgagee's charging thousands of dollars in excess interest to mortgagors. The Petitioners' Answer to KFCB's complaints in the three foreclosure cases raised the defense of "recoupment" for overpaid interest.

After the filing of amended complaints by KFCB by leave of court and amended answers filed by Petitioners herein, the Defendant mortgagors, the trial court granted Plaintiff Keystone Farm Credit Bank's Preliminary Objections to the Answer and counter-claims and threw out all of Petitioners' defenses to Plaintiff's actions.

Specifically, in this first round of the proceedings, the trial court threw out all defenses relating to the *Farm Credit Act of 1971, 12 U.S.C. §2201 et seq.* citing the line of cases so often quoted in the various Circuits to the effect that farmer mortgagors have ". . . no private right of action or any affirmative claim based on any alleged violation by the Federal Land Banks of the *Farm Credit Act.*" (Trial Court Opinion dated April 24, 1992 attached as part of Appendix A).

That subject ruling by the Trial Court was appealed as an interlocutory appeal to the Pennsylvania Superior Court. On March 2, 1993 the Superior Court Affirmed the Trial Court without discussion except to commend the Trial Court on a "splendid opinion." (See Appendix B). On July 26, 1993 the Pennsylvania Supreme Court issued its Per Curiam denying Defendant's Petition for Allowance of Appeal. (See Appendix C).

For the purposes of all subsequent proceedings leading to the trial court's granting summary judgments, the Superior Court's affirmance of the trial court, and the Pennsylvania Supreme Court's denial of leave to appeal, these opinions were deemed to be the "law of the case" which was used to preclude and ignore the issues raised by Defendants as to the language in their contracts and all other issues of fact or law relating to the incorporation of the FCA into their contracts raised by Defendant-mortgagors in their responses to Motions for Summary Judgment. The law of the case doctrine led directly to the granting of the Summary Judgment motions of Plaintiff.

After the Pennsylvania Supreme Court denied leave to appeal from the holdings of "no private right of action" under the Farm Credit Act, the case then went back down to

the Trial Court for further proceedings on the Plaintiff's Complaints. Plaintiffs moved for Summary Judgment and Defendants' first set of attorneys withdrew from the case. The court granted a delay for Defendants to retain new Counsel, which they did within the deadline set by the Trial Court. Defendant-Petitioners herein then filed New Matter and Responses and Affidavits in Opposition to the Summary Judgments. (See Appendix G-2).

In opposition to Plaintiff's Motions for Summary Judgment in three mortgage foreclosure cases, Petitioners filed an Answer with New Matter and Affidavits in Opposition to Summary Judgment (Appendix D) Petitioners therein raised issues of fact including averments by affidavit that KFCB had not complied with the requirements of the *Farm Credit Act of 1971, 12 U.S.C. §2201 et seq.*, (the FCA) for notice of loan restructuring rights and other procedures under the FCA required before a mortgagee can foreclose a mortgage.

Plaintiff KFCB averred that they had given Petitioners Notice of restructuring rights but argued that they were not subject to the terms of the FCA because of the "law of the case doctrine." Other fact averments in Petitioners' affidavits were uncountered by KFCB by affidavit or otherwise. During the pendency of the first round of interlocutory appeals, the parties chose not to do discovery since they did not know whether any defenses would be upheld. Consequently, no evidentiary hearings were held by the trial court and no testimony or discovery was taken by either party prior to the granting by the court of summary judgments for Plaintiff.

Petitioners specifically stated at item six of their Answer to Plaintiff's Summary Judgment Motions in the three actions ". . . that Plaintiffs have no right to sue for foreclosure until they can sustain their burden to prove they have complied with all of the requirements of *Farm Credit Act, 12 U.S.C. §2201 et seq. as amended;* further affirmatively allege that said Act sets conditions precedent to suit which Plaintiffs have not satisfied so that their Complaints in Foreclosure should be dismissed."

At item II under Affirmative Defense and New Matter in Defendant Petitioners' Answer to Summary Judgment Motions, (Appendix G) Petitioners averred that "... Plaintiffs are estopped from relying upon their Motions for Summary Judgment and their Complaints in foreclosure by virtue of their noncompliance with the federal statute upon which the relationship of lender and borrower-member [sic] based, namely that it was subject to the *Farm Credit Act, 12 U.S.C. §2201 et seq. and all acts amendatory thereof or supplementary thereto."*

Thus the Pennsylvania trial court and the Superior Court and Supreme Courts, all effectively construed state pleading rules to unconstitutionally deprive Harnishes of their liberty to contract without due process of law and from raising legitimate contract issues in responses and affidavits in opposition to summary judgment motions.

Under such rulings by the courts all of the factual averments made by Harnishs were simply wiped away as if not raised at all, even though many of such averments were not countered by Plaintiff KFCB. These questions of fact alleged non-compliance by Plaintiff with the restructure provisions of the Farm Credit Act, the payment by your Petitioners of 1.3 million dollars on the mortgages in

question, failure of Plaintiff's in the action to account for such payments by Petitioners, failure of Plaintiff to follow loan closing procedures outlined by the *Farm Credit Act of 1971, 12 U.S.C. §2201 et seq.* under which Plaintiffs were chartered and to which the mortgages were expressly made subject, the failure of Plaintiffs to give Petitioners notice under the FCA of restructuring provisions and the inducements to your Petitioners to enter the mortgages by virtue of the express incorporation of the said Act into the mortgage contracts and that Petitioners were issued stock to make them co-owners in the Plaintiff bank. (Appendix G consisting of Petitioners' Answers to Summary Judgment Motions and Affidavits in opposition to Summary Judgment)

Plaintiff argued that Defendants had admitted indebtedness because their New matter and defenses were thrown out by the trial court and that Defendants ". . .should be deemed to have admitted these averments." (Quote from page three of Plaintiff's Memorandum of Law in Support of their Motions for Summary Judgment.) Plaintiff's went on to argue that Defendants had admitted sufficient facts to allow summary judgment. The trial court and the Pennsylvania Superior Court agreed with this argument, finding that Summary Judgments were proper in all three cases dealing with the three seperate parts of the Harnish farm property.

Sheriff's sales have been scheduled of the three tracts of land for May 29, 1996. Petitioners will suffer irreparable injury in the event that there is no stay issued to stop the sheriff's sales on each parcel of land in question.

In an Order dated November 8, 1994, the Trial Court granted Plaintiff's Summary Judgment Motions (Appendix

D-1.) and filed an Opinion on March 10, 1995, after Defendants had filed their appeal with the Superior Court (Appendix D-2).

REASONS FOR GRANTING THE WRIT

When State Courts use and apply state law to deprive its citizens rights guaranteed to them under the United States Constitution, a substantial federal question is posed which calls for intervention by this court under its power to grant writs of certiorari from the State Courts. Further, when State Courts so construe a federal statute as having terms which somehow preclude private parties from adopting it as the law of their private agreements by incorporating the statute as terms in their contracts, the state courts have unlawfully denied its citizens of the right to contract as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

Further, where there is a direct conflict between the rulings by the Pennsylvania courts including its Supreme Court in denying leave to appeal in this case and the Montana Supreme Court which has ruled on the same issue, the conflict should be addressed by this court by granting a writ of certiorari from the Pennsylvania State Courts' actions. The net effect of the conflict between the two sister states' Supreme Courts enables farm borrowers in Montana and disables farm borrowers in Pennsylvania, from incorporating the terms and requirements set forth in the *Farm Credit Act, 12 U.S.C. §2201 et seq.* in the private mortgage contracts.

Consequently, when private parties have incorporated the *Farm Credit Act, 12 U.S.C. §2201 et seq. As amended* in

their mortgages in Montana, they can utilize the terms and provisions of the statute as a privately adopted scheme of contract remedies in addressing the conflicts between the private parties. However, because of the unconstitutional limitation on the liberty to contract by the Pennsylvania State Courts in this case, private parties who have utilized the same clauses in their mortgages as those in Montana, are being unlawfully deprived of their property without due process of law.

This conflict should be addressed by this court and resolved to protect the constitutional rights of private parties in all of the United States.

There are also conflicts between and among the various federal and state courts concerning the rights of farm mortgagors to raise defenses to foreclosure actions based upon violations by the farm credit lenders of the *Farm Credit Act, 12 U.S.C. §2201 et seq. as amended.* Many courts find that such defenses are proper and many other courts find that they are not. These conflicts should be addressed and resolved by this court in order to stop the flood of appeals which have been occupying the state and federal courts on these issues so as to clearly enunciate the clear construction of the federal law under the *Farm Credit Act, 12 U.S.C. §2201 et seq. as amended* in the farm credit system across the country, both in situations where the FCA is incorporated in the mortgages and those in which it is not.

In a Petition for Writ of Certiorari filed in the case of *Harper vs. Federal Land Bank of Spokane,* 692 F.Supp. 1244, (D.Ore 1988) rev 878 F.2d 1172 (9th Cir. 1989) cert.den. ____ U.S. _____, _____, 110 S.Ct. 867, 107 L.Ed 2d 951 (1990) it was stated that there are over 600,000 borrower-

shareholders who cooperatively own the Farm Credit System extending over $50 billion dollars in loans representing approximately 30 percent of all agricultural credit in the nation. The denial of Certiorari in the *Harper* case is not relevant to the issues posed herein inasmuch as that case dealt only with the limited issue of whether farm mortgagors had an "...implied private right of action" to enforce the FCA when there was no issue raised of its being incorporated in the mortgage(s) at issue therein.

The case at bar poses more compelling constitutional issues which should be addressed by this court in granting the within petition for writ of certiorari. The *Harper* case did not cite or argue the more serious question posed here of whether State courts can preclude private enforcement of terms of the Act when the private parties have expressly agreed in the mortgages that they were to be subject to the *Farm Credit Act, 12 U.S.C. §2201 et seq. and all Acts amendatory and supplementary thereto.*

As the farm crisis in America deepened in the 1980's, Congress amended the Farm Credit Act to include remedies expressly defining how Farm Credit Banks were to administer loans, declare them to be distressed and specifically setting out mandatory requirements of what actions were to be taken by Farm Credit Banks before commencing foreclosure. The purpose and intent of the Amendments to the Farm Credit Act was to address the crisis of declining property values combined with market forces which jeopardized the economic health of farming in America. The Farm Credit Banks were administering their loans as if they had forgotten that the Act which granted them their charters, made the farmers, cooperative members of the Farm Credit System Banks.

Stock was issued to the Petitioner Harnishes and they were notified of meetings of the Association from which they had received their loans. The Farm Credit Banks forgot who their member-shareholders were and the purposes for which they were organized in the beginning. They administered their loans as if the farmer was their enemy, not the sustainer of the American economy and the providers of our food and milk.

During the course of the proceedings, the Harnish property has been appreciating. In 1986 the various pieces of property which are still owned today by the Harnishs was appraised at $1,257,000. . Today, in 1996, the best personal estimate is that the property is now valued at $1,627,000.. John Harnish has been a good steward of his property and should have the lawful opportunity to lay his legitimate contract claims before the Pennsylvania Courts, to take discovery and to have a trial on the merits of what it is that he lawfully owes.

EQUITABLE DEFENSES

This court should grant the writ of certiorari in this case based upon Supreme Court Rule 10(a) and because of conflicts between State Courts and Federal Circuit Courts on whether or not to allow equitable defenses to mortgagors in farm foreclosure cases.

Even with the denial of certiorari in the *Harper* case, there is still direct conflict among various state and Federal Courts on the issue of whether a farmer may have affirmative defenses based upon the *Farm Credit Act, 12 U.S.C. §2201 et seq.* . These cases do not consider the circumstances of the Harnish mortgages herein where the

mortgages expressly state "This Mortgage is subject to the Farm Credit Act of 1971 and all acts amendatory thereof or supplementary thereto." The cases of *Federal Land Bank of St. Paul v. Overboe,* (N.D. 1987) 404 N.W.2d 445; *Federal Land Bank of St. Paul v. Bosch,* 432 N.W.2d 855, (N.D.1988) *Burgmeier v. Farm Credit Bank of St. Paul,* 499 N.W.2d 43, (Minn.App. 1993), *Lillard v. Farm Credit Services of Mid-America,* 831 SW 2d 626, (Ky.App.1991), *Farm Cred Bank of Spokane v. Parsons,* 758 F.Supp 1368, 1370, (D.Mont. 1990) all permit equitable defenses by farm mortgagors under the Farm Credit Act without reference to whether the terms of the Act are incorporated in the mortgages.

In conflict with those cases are various federal and state court decisions which do not allow equitable defenses for farm mortgagors and find no private right of action in the farmer. However, it is critical to note that these cases do not deal with the situation here where it is shown that the lender has breached the terms of its contract by failing to comply with the terms of the Act. *See Smith v. Russellville Production Credit Ass'n*, (11thCir.1985), 777 F2d 1544; *Harper v. Federal Land Bank of Spokane,* (9thCir. 1989), 878 F.2d 1172; *Farm Credit Bank of Spokane v. Debuf,* (D.Mont.1990), 757 F.Supp. 1106; *Griffin v. Federal Land Bank of Wichata,* (10th Cir.1990), 902 F.2d 22; *Zajac v. Federal Land Bank of St. Paul,* (8th Cir.1990), 909 F.2d 1181; *Saltzman v. Farm Credit Services,* (7th Cir.1991), 950 F.2d 466; *Production Credit Ass'n v. Van Iperen,* 396 N.W.2d 35 (Minn. Ct. App.1986). Only the Van Iperen case mentions the contract issue raised herein regarding incorporation of the Act in the contract.

This conflict between the various U.S. Circuit Courts and various State courts of appeals should be resolved by this court's granting a writ of certiorari in this case where

the terms of the contract makes it subject to the Farm Credit Act.

DISCUSSION

Writ of certiorari should be granted in this case because of the violation of petitioner's constitutional rights of liberty to contract and of being deprived of his land without due process of law.

In oral argument of the within Harnish case before the Pennsylvania Superior Court, one Superior Court Judge attacked Counsel for Petitioners, verbally berating his client as "deadbeat". Said Judge attacked the Farm Credit Act itself. (No record is kept by the Superior Court on oral arguments so that no transcript can be provided.) The court used its ruling on the previous interlocutory appeal that "there was no private right of action" as the law of the case, to avoid the distinct constitutional issues of the private contract rights of the parties when the contract incorporates the said Federal Act in its terms.

This court has held in the case of *Howlett By and Through Howlett v. Rose,* 496 U.S. 356, 110 L.Ed.2d 332, (1990) that the supremacy clause forbids state courts to dissociate themselves from federal law because of disagreement with its contents or refusal to recognize superior authority of its source. While that case was one in which the state court dismissed a federal civil rights suit against a school board based upon sovereign immunity, it enunciates an important principle which should apply in this case.

The state superior court in the Harnish appeal verbally expressed its disdain for the Farm Credit Act and orally stated its disagreement with the requirements the Act imposes upon Farm Credit Banks in foreclosure situations.

The court held that its ruling on the earlier interlocutory appeal was the "law of the case" which it said precluded it from addressing the issue of the incorporation of the Farm Credit Act into the parties' mortgage contracts.

Enforcement of contracts is an area traditionally reserved to the states. Yet allowing Pennsylvania state courts to read out of parties' contracts language such as that in these parties' mortgages, which language was expressly intended to make the terms of a federal statute binding upon the parties in the contract, is a violation of the Supremacy Clause in the United States Constitution.

Writing for a majority of this court in the case of *Allgeyer et al. V. State of Louisiana,* 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832, (1897) Mr. Justice Peckham stated:

> "In the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property must be embraced the right to make all proper contracts in relation thereto, and although it may be conceded that this right to contract in relation to persons or property or to do business within a jurisdiction of the state may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the state as contained in the statutes, yet the power does not and cannot extend to prohibiting the citizen from making contracts of the nature involved in this case . . . " *(41 L.Ed at p. 836)*

While the court in the *Allgeyer* case was discussing an insurance contract made in New York but the parties sought to enforce it in Louisiana, this court's language recognizes

the liberty of private citizens to make lawful contracts as in the case at bar mortgages. If and when private parties in Pennsylvania agree between themselves to incorporate a federal statute as the law of their agreement, this fact does not and cannot become automatically a provision in a contract which the courts of Pennsylvania are entitled to ignore or disregard because they disagree with provisions of the federal law at issue. The remedies of the statute are properly invoked as express contract terms allowing the farm mortgagor to have a right to official, deliberate and careful consideration of his rights, to be given notice of his restructuring rights set forth in the statute and to invoke its other administrative remedies set in place by Congress when it enacted the *Farm Credit Act, 12 U.S.C. ∫2201 et seq. as amended.*

The writ of certiorari should be granted because the Pennsylvania state courts violated the petitioners' privileges and immunities as guaranteed to them under the 14th Amendment to the United States Constitution.

The Harnishs contend that the granting by Pennsylvania's State Courts of KFCB's Motions for Summary Judgment without confronting and addressing the issue of the incorporation of the FCA in the mortgage contracts as binding contract terms, and without addressing and confronting legitimate questions of fact raised in Harnish's Response to the Motions for Summary Judgment, including Affirmative Defenses, New Matter and Affidavits was a denial by Pennsylvania Courts of the privileges and immunities extended to Harnishs as United States citizens. Such granting of judgment by the State Courts' throwing out all defenses and holding to prior rulings in the case which never addressed the ability of the private parties to incorporate the Farm Credit Act in their contract, if allowed to stand will take away the Harnish's farm property and their liberty to contract, without due process of law.

It also further follows that the Petitioner mortgagors were denied equal protection of the laws within the purview of the Fourteenth Amendment because KFCB were allowed to use State law and court procedures as a shield to avoid its lawful contractual obligations made binding upon it and enforceable by Harnish's under the express terms of their contract incorporating the Farm Credit Act as part of the contracts' provisions.

At the inception of these three foreclosure cases against petitioners the parties' mortgage contracts were before the court. Thus the issue of the incorporation of the Farm Credit Act in those contracts was always before the court even before the issue was formally raised by petitioners in response to KFCB's Motion for Summary Judgment.

In the case of *Valle et al v. Stengel et al,* 176 F.2d 697 (1948) C.J. Briggs, writing for a unanimous court cited the so-called *Slaughter House Cases,* 16 Wall. 36, 83 U.S. at pp. 76-77, 21 L.Ed. 394, quoting from the decision in *Paul v. Virginia,* 8 Wall. 168, 19 L.Ed. 357, as follows:

> " . . . The privileges and immunities clause insures to the citizens " * * * in other States the same freedom possessed by the citizens of those States *in the acquisition and enjoyment of property and in the pursuit of happiness;* and it secures to them in other States the equal protection of the laws". If a man cannot make or enforce a contract already made because of the interference of a State official officer he is being denied a civil right. He cannot support himself or his family or earn a living under the system to which we adhere. The *liberty* involved is the liberty of contract."

> "It is clear that the Supreme Court has held that the words " Privileges and Immunities" of Article IV, Section 2, protect the rights of a citizen to engage in lawful commerce, trade or business without molestation or harassment."

The writ of certiorari should be granted in this case under Supreme Court Rule 10(b) because there is a direct conflict between the Montana Supreme Court and the Pennsylvania Supreme Court on the issue of the private enforceability of the Farm Credit Act (12 U.S.C. §2201) when said federal act is incorporated by reference in the parties' private mortgage contracts.

In the case at bar, a citizen of Pennsylvania is denied the same rights that a citizen in the State Montana can readily protect and enforce, merely because of a difference in the erroneous refusal of Pennsylvania State Courts to allow a private party to incorporate the Farm Credit Act in their private contract and enforce its terms as contract terms. This is a conflict which should be remedied by this Court by granting the within Petition for Writ of Certiorari.

There was a similar issue raised in the case of *Smithson v. U.S.*, 847 F.2d 791 (Fed.Cir. 1988), cert.denied, 488 U.S. 1004(1989). However, that case is distinguishable from this one. There, the farmer brought an action against the Farmers Home Administration (FHA) in the Court of Claims for breach of express and implied-in-fact contract, because the FHA did not make a loan within a certain period of time. The loan agreements with FHA had a clause in them which stated that they were subject to "all agency regulations". The case held that this language in the contract did not bring it within the jurisdiction of the Court of Claims.

The Federal Circuit found that the "incorporation argument states, not a true contractual claim, but a tort claim against the Government for misfeasance and misconduct; that claim is, of course outside the Claims Court's jurisdiction. ..." *Id. at 794 of 847 F.2d.* In so finding the Court did not state that it was improper for the parties to incorporate the federal regulations into their contract. It held that the parties had a tort remedy under the circumstances of that case.

In the *Smithson* case, at least the Plaintiff farmer was not left totally without a remedy, as were the Harnishs in the case at bar. That case is distinguished as containing no analysis of defenses to foreclosure actions or incorporation of a federal statute into a contract. It only refers to the narrow question of whether agency regulations could be considered as grounds to sue the government agency in the Court of Claims.

The Supreme Court of Montana has found that farmer borrowers do have express private rights of action when the statute is incorporated into the mortgage contract by reference.

In the case of *Farm Credit Bank of Spokane vs. The District Court of The Third Judicial District of the State of Montana,* 881 P2d 594 (Mont.1994) mortgagors, the Gravely's, sought contract damages against the Farm Credit Bank for breach of contract based upon numerous allegations. The District Court (a State court) denied the Farm Credit Bank's Motion for Summary Judgment because it concluded that there were genuine issues of fact raised by the Graveleys' affirmative defense based on equitable estoppel and based upon the bank's alleged failure to comply

with the *Farm Credit Act of 1971, 12 U.S.C. §2201 et seq.*, the Act at issue in the case at bar.

The Montana District Court dismissed Gravely's breach of contract action and the Montana Supreme Court reversed on that issue, finding that Gravelys had every right to enforce the terms of the Farm Credit Act upon the FCB because it was incorporated in the contract of the parties.

The issues were certified to the Montana Supreme Court with the concurrence of the District Court for adjudication of the issues as a Court supervisory matter to determine whether the decision denying the Summary Judgment Motion of FCB was correct.

The Montana Supreme Court discussed the contract issue at page 603 of the 881 P.2d volume, stating:

> "The power of parties "to contract as they please for lawful purposes is a basic principle of our legal system. . . ."
>
> Calamari and Perillo, Law of Contracts 6 (3d ed. 1981). Furthermore, "parties are generally free by agreement to impose new duties on each other . . . ." Restatement (Second) of Contracts introductory note to topic 4, *Interference With Other Protected Interests*, Vol. II, p. 60 (1981)."

The Montana Supreme Court also found that

> "... allowing enforcement of the terms of the federal statute as an ordinary contract

> provision, is not in conflict with the federal statute in question . . . . but that instead, contractual enforcement of the Act's terms furthers the purpose of the federal legislation." id at page 605.

While the case at bar was on appeal to the Pennsylvania Superior Court, another case was decided by the Montana Supreme Court which concerns these issues. This is the case of *AgAmerica, FCB v. Gary G. Robson and Dona Robson,* 901 Pacific Reporter, 2d Series, 100 (Mont.1995).

The facts of the Robson case are remarkably similar to the Harnish matter. Gary and Dona Robson signed mortgages with Ag America FCB which incorporated the provisions of the Farm Credit Act of 1971 and amendments thereto. The Montana Supreme Court found that this included the loan restructuring provisions of the Agricultural Credit Act of 1987. In August of 1990, the Robsons applied for loan restructuring under the Farm Credit Act provisions in question.

The Plaintiff, FCB denied the application for restructuring and the Robsons requested review of the decision by AgAmerica's Credit Review Committee. The Committee upheld the denial of restructuring. Plaintiff then commenced its foreclosure action and the Robson alleged as an affirmative defense that AgAmerica had failed to comply with the loan restructuring provisions of the Act and counter-claimed for damages based upon AgAmerica's alleged breach of fiduciary duty. Robson moved to compel discovery and AgAmerica moved for Summary Judgment.

The District Court granted AgAmerica's Motions for Summary Judgment and denied Robson's Motion to compel discovery. The Robsons listed the same Farm Credit Act requirements sought to be enforced by the Harnishs under the terms of their contracts with the KFCB in the case at bar. The Robsons listed these requirements as affirmative defenses to the foreclosure action brought by AgAmerica. The Montana Supreme Court agreed that the affirmative defenses would properly lie in this situation where the Act was incorporated in the mortgages.

The court found that the lower court had not found that AgAmerica had established the absence of a genuine issue of material fact and had ". . . impermissibly shifted the initial burden on summary judgment from AgAmerica to the Robson." AgAmerica, FCB v. Gary G. Robson and Dona Robson, 901 Pacific Reporter, 2d Series, 100, 103 (Mont.1995).

In the case at bar, the Pennsylvania Courts first obliterated all Harnish defenses under the no implied private of action theory, then, it appears, the court put the burden on the Harnishs to establish questions of fact. This was error which deprived the Harnishs of their property without addressing the fact issues they had raised in response to the Motions by Plaintiff for Summary Judgments in the three foreclosure cases in question. In so doing, the Pennsylvania courts deprived petitioners of their property without due process of law and denied them their liberty to contract.

In the Robson case, because the District Court had granted Summary Judgments for the mortgagee, the Montana Supreme Court found that the effect of that decision . . .

> "Is to allow AgAmerica to select the parts of the Act with which it chooses to comply. *The Act,*

by its terms, does not permit such unfettered discretion in a lender, and neither will this Court, where the mortgage at issue incorporates the Act into the mortgage contract." **(Italics added for emphasis)**

In the case at bar, the Trial Court granted Summary Judgments for the mortgagees in spite of uncountered affidavits filed by Harnishes in opposition to the Summary Judgment Motions and in spite of Answers to the Summary Judgment Motions, both of which set up affirmative defenses based upon the incorporation of the Act into the parties' mortgage contracts and the noncompliance with the mandatory terms of the Act by the KFCB.

The Robson court also found that discovery should have been permitted under the circumstances of the foreclosure action. In the case at bar, the Harnishes were not permitted discovery at the summary judgment phase. They were foreclosed by the Trial Court and the Pennsylvania Superior Court and Supreme Courts on the interlocutory appeal from pursuing any defenses whatsoever to the foreclosure action. By the time the case had wound its way through the first round of appeals in the Pennsylvania Court system, the court found that it was too late for the Harnishes to even raise the issue of the noncompliance by the KFCB with the Farm Credit Act by application by the courts of the doctrine of the "law of the case". The courts ignored that the contract incorporating the federal statute was always before it.

The same Justice of the Pennsylvania Superior Court who wrote the Opinion for the Court on the interlocutory appeal, verbally told Counsel for the Harnishes on oral argument of the final appeal, quote, "Your client (Mr. Harnish) is a deadbeat." "The Farm Credit Act did not intend to allow people not to pay their mortgages." Such Justice

did not recuse himself from the case and participated in writing the opinion for the Court.

Petitioners contend that under these circumstances, the Supremacy Clause of the United States Constitution was violated by the Pennsylvania Courts. Further, the national gravity of the situation which allows the highest courts of the state of Pennsylvania to execrate a federal statute in spite of the Acts' incorporation in the parties' contracts is precisely what the Supremacy Clause of the United States Constitution was designed to protect against.

The fact that there are 600,000 active loans in the Farm Credit System makes it critical for the Farm Credit System to have a veracity and reliability that its mandatory requirements will be obeyed by lenders in the system. For every farm that is lost, another source of food or milk for the American family is lost with it. When parties to a mortgage contract make the mortgages subject to the Act, they should have the backing of the courts and the law that they can rely upon just what rights and remedies they have which governs their relationship with the lender institutions in question.

Does the American farmer have a right to rely on his having a remedy in connection with his loan when he agrees to sign a mortgage that is subject to the terms of the *Farm Credit Act, 12 U.S.C. ƒ2201 et seq. as amended?* Petitioners urge that this court answer in the affirmative under the circumstances of this case and grant this *Writ of Certiorari.*

The Montana court enunciates the principles which we believe are applicable in the case at bar. At page 606 the court announces:

> "We hold that when the terms of the Farm Credit Act of 1971, found at 12 U.S.C. §2001, et seq. including the restructuring provisions of the Agricultural Credit Act of 1987 found at 12 U.S.C. §2202a are incorporated by the parties as a term of their contract, that those provisions are as enforceable in a court of law as any other contract term."

In the case of *Western Farm Credit Bank v. Pratt*, 860 P2d 376 (Utah App, 1993). After a review of a number of these decisions the Pratt court reversed the trial court's grant of summary judgment in a case where, like this one, the mortgagors filed affidavits in opposition to Summary Judgment asserting the noncompliance by the Farm Credit lender with the Farm Credit Act 12 U.S.C.S. 2001 et seq..

In the case of *Federal Land Bank of St. Paul v. Halverson*, 392 N.W. 2d 77 (N.D.1986), the North Dakota Supreme Court states:

> We recognized that federal courts have unanimously concluded that borrowers do not have a private cause of action against federal land banks for damages or injunctive relief under the Farm Credit Act and regulations, but noted that <u>these decisions do not bear directly on the different issue of whether a qualified borrower may resist a foreclosure upon the grounds that he did not receive the forbearance called for by the regulation. Halverson, supra,</u> 392 N.W.2d at 84. (Emphasis added.)

CONCLUSION

Are we a nation of laws or a nation of men? Is it fair to throw out all defenses of a farmer in foreclosure cases and proceed to judgments which are now poised

to take all of his ancestral farm property from him and his family because for whatever reason he was not advised well enough to proceed on basic contractual issues before the summary judgment motions were made by the foreclosing bank? Is it fair to allow yet another dairy farm go out of business because the Pennsylvania Courts disagreed with the terms and provisions of the Farm Credit Act and ignored the fact that this law was incorporated into the parties' private contracts in order to provide remedies?

Is it fair for the farmer to pay the bank in excess of 1.3 million dollars and ignore his sworn affidavit to that effect and then allow, without any hearing or testimony on the merits, the farm credit bank in question to take the farmer's land too? John Harnish has been a good steward of his property. He deserves the lawful opportunity based upon his contracts with KFCB to plead his contractual remedies, to take discovery on them and to have a trial on the merits in the courts of this land.

WHEREFORE, Petitioner prays that this Honorable court will grant them a *Writ of Certiorari* to review the decisions of the Pennsylvania Court of Common Pleas, Superior Court and Supreme Court in the case at bar and that this Court grant a Stay of Execution to stay the Sheriff's Sales now set for each parcel of property in question on May 29, 1996; and Petitioners do ever pray for such other and further relief as this Court in its wisdom shall grant.

Respectfully Submitted,

David S. Brady, Esq.
Counsel of Record
Attorneys for Petitioners

APPENDIX A-OPINION COURT OF COMMON PLEAS OF LANCASTER COUNTY DISMISSING ALL DEFENSES DATED APRIL 24, 1992

KEYSTONE FARM CREDIT, ACA,	:	NO. 3070-1990
Plaintiff	:	NO. 3071-1990
	:	NO. 3072-1990
v.	:	
JOHN M. HARNISH AND	:	
EVELYN M. HARNISH,	:	
Defendants	:	
	:	
and	:	
THE UNITED STATES OF	:	
AMERICA,	:	
Additional Defendant	:	

OPINION

BY: STENGEL, J., APRIL 24, 1992

The plaintiff filed a mortgage foreclosure action. The defendants filed an answer raising two (2) issues. The first involves the defense of recoupment. Essentially, the defendants argue that the plaintiff breached its duty to the defendants to obtain the best available interest rate. The gist of this argument is that the total amount due to the plaintiff should be reduced by the amount the defendants "lost" because the plaintiff did not obtain the best available interest rate for the defendants. The second argument is that the plaintiff violated the Pennsylvania Unfair Trade Practices and Consumer Protection Act, 73 Pa. C.S.A. Section 201-1, et. seq. ("Consumer Protection Act").

The current posture of this case is on plaintiff's preliminary objections to defendants' answer and

counterclaim. This opinion will consider the factual background and the arguments advanced by both parties on these interesting issues.

I. BACKGROUND

The property is a farm in West Lampeter Township, Lancaster County. On July 26, 1990, plaintiff Keystone Farm Credit, ACA ("Keystone") filed these three (3) mortgage foreclosure actions against defendants John M. and Evelyn M. Harnish, farmers in West Lampeter Township, Lancaster County. Over a five (5) year period beginning in 1976, the Harnishes borrowed more than $760,000.00 from the Federal Land Bank of Baltimore ("FLB") to use in their farming and agricultural business. The loans were secured by the real estate mortgages that are the subject of these mortgage foreclosure actions. On January 1, 1989, the mortgages were assigned to Keystone from the Farm Credit Bank, who is successor to the FLB.

The Harnishes are delinquent on the payments of these loans and now owe Keystone in excess of $825,000.00.

In response to plaintiff's original mortgage foreclosure actions, the Harnishes filed answers with new matter and counterclaims. Plaintiff filed preliminary objections to the new matter and counterclaim in each of the three (3) actions. Briefs were filed and oral argument was held before the court. However, plaintiff then filed a motion to amend the complaint is citing an incorrect identification of the plaintiff in the captions and in the first paragraphs of the complaints. Plaintiff's motion was granted by order of this court on January 17, 1991. Amended complaints were then filed and the defendants filed answers with new matter and counterclaims.

The Harnishes state that the FLB had a duty to make loans to farmers, specifically the Harnishes, at the lowest possible interest rates. The Harnishes argue that this statutory requirement placed an affirmative duty on the FLB to conduct its financial transactions in such a way as to ensure the lowest possible interest rate to them. The Harnishes contend that the failure to obtain the lowest possible interest rate is, in fact, the cause of their present financial difficulty.

This is the essence of the recoupment defense. The Harnishes contend that their obligation to Keystone should be reduced by the amount they are entitled to "recoup", that is, the amount of money they lost because of the failure of the FLB to obtain the lowest possible interest rate. They note that they are not seeking to affirmatively recover on this recoupment theory. Rather, they are seeking to have the amount they owe to Keystone reduced by the amount the FLB could have saved them had it acted in a financially responsible manner.

The second issue involves a counterclaim based on a violation of the Consumer Protection Act. Defendants aver that they purchased services from plaintiff in the form of financial assistance, loan assistance and mortgage assistance and that they purchased these services to obtain funding and financing for their farm. The Harnishes argue that the farm is used for personal, family and household purposes, among other reasons. (See answer, new matter and counterclaim at Paragraph 25.) The Harnishes contend that they sustained losses in the amount of thousand of dollars as the result of the unfair and deceptive acts and practices of plaintiff, including certain advertising and other actions. (See answer, new matter and counterclaim at Paragraphs 26 through 29).

This case is now before the court on plaintiff's preliminary objections to the new matter and counterclaim

filed by defendants in each of the three (3) actions. Briefs have been filed and oral argument has been held before the court. It is clear that there are three (3) issues to be resolved at this point: (1) whether defendants can maintain an action against plaintiff on the counterclaim on violation of the Consumer Protection Act; (2) whether there is a legal basis for defendants to proceed on their recoupment defense; and (3) whether certain exhibits attached to the new matter and counterclaim, specifically a magazine article, a 60-page report from the General Accounting Office on the farm credit system and a 1986 report on the Farm Credit Act to Congress, may be allowed to remain as part of the pleadings in this case. These issues will be discussed in the sections to follow.

II. DISCUSSION

A. Consumer Protection Act

Plaintiff has set forth five (5) reasons why defendants' counterclaim should be dismissed. Initially, plaintiff contends that defendants lack standing to bring an action under the Consumer Protection Act because the mortgage loans were fore business purposes not personal or consumer purposes. Plaintiff notes that the Consumer Protection Act does not apply to mortgage loans because mortgages are not a purchase or lease of goods. In addition, plaintiff contends that federal law preempts this state court action for violation of the Consumer Protection Act. Plaintiff also notes that there is no cause of action under the Consumer Protection Act because defendants did not plead that they acted "in reliance on deceptive practices". Finally, plaintiff contends that there is a violation of Pa. R.C.P. 1148 because the counterclaim does not arise out of the same occurrence or set of occurrences as the initial complaint. We need only address three (3) of these issues.

The Consumer Protection Act allows private causes of

action only in situations where consumers have purchased goods for their personal use rather than for business purposes. See, American Standard Life v. U.R.L., Inc., 701 F. Supp. 527, 538 (M.D. Pa. 1988). The statutory language of the Consumer Protection Act itself limits the right to bring a private cause of action to person who lease or purchase "goods or services primarily for personal, family, or household purposes...." 73 Pa. C.S.A. Section 201-9.2(a); Wright v. North American Life Assurance Company, 372 Pa. Super. 272, 280, 539 A.2d 434, 438 (1988).

Defendants admit that the more than $760,000.00 in mortgage loans were not primarily personal but that personal uses were a factor. (See, answer, new matter and counterclaim at Paragraphs 7, 30). They have not, therefore, met the standing requirement of the Consumer Protection Act because they have not alleged that the mortgage loans were used "primarily" for personal, family and household purposes.

Moreover, it is inconceivable to this court that the Harnishes used in the range of $760,000.00 primarily for personal, family and household purposes. In fact, Exhibit D to defendants' answer says that the purpose of the loans was for agricultural business purposes and not for consumer use. It says that the FLB loans money to farmers for buying acreage, for building on the acreage, to purchase seed and fertilizer, and to purchase equipment. Nothing is said about a loan for personal, family and household purposes.

In short, the Harnishes are involved in a business relationship with plaintiff. Defendants failed to claim in their pleading that they were "consumers" and yet argue in their brief that they went to plaintiff as "consumers of a mortgage service". Defendants ask this court not to forget that they are "farmers and that the property encumbered by the mortgages on which plaintiff seeks to foreclose is where the Harnishes

and their family live".

This court is not insensitive to the plight of the American farmer and, more specifically, to the plight of the Harnishes. This court does not take lightly its obligation to administer the laws of the Commonwealth with justice and compassion. However, the fact that the defendants have a home on this farm does not make this loan a home mortgage.

Their mortgage loans were not primarily for personal, family and household purposes. Therefore, the defendants do not have standing to bring a private cause of actions under this Act. Defendants' counterclaim based on the Consumer Protection Act will be dismissed on the basis of lack of standing.

In addition, there is no legal authority to support the contentions that the Consumer Protection Act applies to mortgage loans. Private actions under the Consumer Protection Act are limited to persons who "purchase or lease goods". Private actions under the Consumer Protection Act are limited to persons who "purchase or lease goods". 73 Pa. C.S.A. Section 201-9.2(a). Mortgage loans, like the loans in the instant case, do not qualify as a purchase or lease of goods and services. See, Epstein v. Goldome, 49 D. & C.3d 551, 557-58 (Del. Co. 1987). The Harnishes have failed to state a legally sufficient cause of action in their counterclaim and plaintiff's demurrer should be sustained for that reason.

There is a third reason why defendants' counterclaim should be dismissed. Pennsylvania Rule of Civil Procedure 1148 governs the circumstances when a defendant may plead a counterclaim to a mortgage foreclosure action. That rule provides that a defendant may only plead a counterclaim when it arises from the same transaction or occurrence from which the mortgage foreclosure action itself arose. Case law has

interpreted this rule to mean that the counterclaim allegations must have been a part of or incident to the underlying creation of the mortgage itself. Chrysler First Business Credit v. Gourniak, 601 A.2d 338, 341 (Pa. Super. 1992); Mellon Bank, N.A. v. Joseph, 267 Pa. Super. 307, 317, 406 A.2d 1055 (1979). Moreover, the appellate courts have said that Rule 1148 should be read narrowly when deciding whether to allow a counterclaim to a mortgage foreclosure action. Chrysler First Business Credit v. Gourniak, 601 A.2d at 341.

The Harnishes' counterclaim does not comply with Pa. R.C.P. 1148 as it is clear that what defendants are complaining about is action that occurred after the inception of the mortgage relationships. Defendants complain about paying excessive interest, which is allegedly adjusted from time to time by Keystone according to the Harnishes' new matter. This action was all subsequent to the creation of the mortgage relationship and, therefore, there is no basis for the counterclaim under Rule 1148.

This court need not address the other issues of preemption, failure to meet the pleading requirements necessary for a viable cause of action under the Consumer Protection Act and the request for money damages in an in rem proceeding.

B. Recoupment

The Harnishes contend that the FLB had a duty to make loans to farmers at the lowest possible interest rates. The Harnishes argue that this statutory requirement placed an affirmative duty on the FLB to conduct its financial transactions in such a way as to ensure the lowest possible interest rate to them. The Harnishes contend that the FLB did not do what they were statutorily required to do and they claim a right of recoupment predicated on the FLB's alleged

violation of this statutory requirement. The Harnishes contend that their obligation to Keystone should be reduced by the amount they are entitled to "recoup", that is, the amount of money they lost because of the failure of the FLB to obtain the lowest possible interest rate. Thus, defendants' recoupment theory is not advanced as a counterclaim for the affirmative recovery of damages but, rather, is asserted as a defense and is meant solely to reduce the liability of defendants to plaintiff.

Plaintiff argues that defendants are prohibited from basing a claim or a defense on the Federal Farm Credit Act. Clearly, the Harnishes have no right to bring either a private cause of action or an affirmative claim based on any alleged violation by the FLB of the Federal Farm Credit Act. Mendel v. Production Credit Association of the Midlands, 656 F. Supp. 1212 (D.S.D. 1987, 862 F.2d 180, 182 (8th cir. 1988). Defendants concede this point of law but argue that they are simply asserting the defense of recoupment for FLB's charge of excessive interest rates. Defendants cite the case of Household Consumer Discount v. Vespaziani, 490 Pa. 208, 415 A.2d 689 (1980), for the proposition that the defense of recoupment may be asserted even when a separate, independent cause of action would be barred. In Vespaziani, the plaintiff lending institution filed a lawsuit against the borrowers who had failed to make loan repayments. In response to this lawsuit, the borrowers filed a counterclaim in which they alleged that the lending institution had violated the Federal Truth-In-Lending Act. The lower court had dismissed this counterclaim because the borrowers' claim under the Act was barred by the one (1) year statute of limitations. The Pennsylvania Supreme Court reversed, holding that because the counterclaim was really a claim for recoupment, which is "defensive" as opposed to "affirmative" in nature, the statute of limitations did not prevent the borrowers from prosecuting the Truth-In-Lending Act claim.

The Harnishes argue that Vespaziani is no different from their situation. In Vespaziani there was a legislative bar--the statute of limitations--and here there is a judicial bar against independent causes of action against farm credit institutions. The Harnishes contend that if the defense of recoupment may be asserted even though a separate action would be barred by the statute of limitation, if follows that the defense of recoupment may be asserted in this case even though a separate cause of action against the FLB would be judicially barred. Defendants, however, are unable to cite any Pennsylvania authority other than Vespaziani to support their argument.

This court finds that Vespaziani is distinguishable form the instant case. In Vespaziani, the Truth-In-Lending Act itself provided a private cause of action to the borrowers who were the victims of violations of the Act by lending institutions. Here, the Federal Farm Credit Act does not provide any private cause of action or even an implied cause of action. Mendel, supra. The Federal Farm Credit Act, on which the Harnishes base their recoupment claim, does not create any obligation or duty on the part of Keystone to the Harnishes.

In Vespaziani, the borrowers had, notwithstanding the statute of limitations, a viable private cause of action against the lending institution. In the instant case, the Harnishes never had any right to bring a cause of action under the Federal Farm Credit Act.

As Vespaziani does not help the Harnishes, neither do the two (2) additional statute of limitations cases cited by defendants: Warner v. Sullivan, 249 Mich. 469, 229 N.W. 484 (1930); and Ness v. Greater Arizona Realty, Inc., 572 P.2d 1195 (Ariz. 1977). Those cases held that the defense of recoupment could be asserted notwithstanding the fact that the statute of limitations was a bar to an affirmative action on the same

matter. Again, these cases are not applicable to the instant case and lend the Harnishes no support. In fact, the Harnishes could not direct this court to one (1) Pennsylvania case where the defense of recoupment was permitted in the absence of an independent right of action.

A recent decision in Michigan, however, discussed using the defense of recoupment in the absence of an independent right of action. In Garst v. Production Credit Association of Southeastern Michigan and Federal Land Bank of Saint Paul, No. 88-4035 CZ, Slip op. (Circuit Court, Mich. July 27, 1989), aff'd, No. 120952, Slip op. (Mich. Ct. App. Sept. 10, 1990), the plaintiff, who was a borrower of Production Credit Association of Southeastern Michigan, claimed that he was entitled to "recoup" excessive interest he had paid as a result of the failure to place call provisions in bonds issued by the Federal Land Bank, a claim which is exactly the same as the Harnishes. Garst made the same argument to the Michigan court that the Harnishes make here: he conceded that he had no right to bring either a private cause of action or an affirmative claim based on federal farm law but he argued that because he was using the federal law defensively as recoupment, he could pursue the action. The Garst court rejected this contention, stating:

> This Court is persuaded that the general rule in the state of Michigan is that if you never had an independent right of action you cannot utilize it in a defense of recoupment... Whether there may ever be a deviation from that rule the Court does not need to determine. It is clear that in this case it must apply because this State is powerless to grant a right of action based on a federal statute

where Congress clearly did not intend one to lie.

...

> In the instant case, it would be necessary to create a right arising out of a federal statute in direct violation of the intent of Congress. No power in any state can create such a right. (emphasis in original)

Garst, NO. 88-4035 CZ, Slip Op. at 2-3.

On appeal to the Michigan Court of Appeals, that court affirmed, holding that Garst was not entitled "to bring a private cause of action to enforce the provisions of the Agricultural Credit Act of 1987". As authority for its holding, the Court of Appeals cited Zajac v. Federal Land Bank of Saint Paul, 909 F.2d 1181 (8th Cir. 1990) and Harper v. Federal Land Bank of Spokane, 878 F.2d 1172 (9th Cir. 1989), cert. denied, 110 S.Ct. 867 (1990). In both Zajac and Harper, the borrower had sought affirmative relief in having his FLB loan restructured and the circuit courts held that a farm credit borrower could not bring a cause of action for affirmative relief under the Agricultural Credit Act of 1987.

After having considered and relied upon Harper and Zajac in concluding that Garst had no cause of action against the FLB, the Michigan Appellate Court made the following concluding remarks as dicta:

> We express no opinion as to availability of any equitable defenses in this regard should defendant's foreclosure proceedings ripen into litigation.

See Manufacturer's Hanover Mfg Corp. v. Snell, 142 Mich App 548; 370 NW2d 401 (1985).

Garst, No. 120952, Slip Op.

The Harnishes view this as "guidepost" language intended to show Garst the way to utilize the recoupment defense as an equitable defense. In Manufacturer's Hanover, the Michigan Court of Appeals held that a mortgagor in a statutory mortgage foreclosure could raise "equitable claims and defenses" after foreclosure by advertisement in summary eviction proceedings. 370 N.W.2d at 404. The Harnishes find it significant that neither in Hanover nor in Garst did the Michigan Court of Appeals ever mention the need to have "an independent right to action" before raising the equitable defense of recoupment.

This court is being asked to use dicta from the Michigan Court of Appeals to create an equitable defense under Pennsylvania law. Vespaziani only goes so far. This court sees no authority to go one step further. The Garst dicta notwithstanding, this court finds that the defense of recoupment is limited to those situations where there would have been a private right of action. Vespaziani controls and the court will not extend Vespaziani.

To recover against a party on the basis of the theory of recoupment, there must be some duty between the party seeking recoupment and the party from whom recoupment is sought. 20 Am. Jur.2d, Counterclaim, Recoupment and Setoff, Section 1 (1965). Having conceded the absence of a statutory right of action under the Farm Credit Act, the Harnishes claim that the Act and its regulations provide a certain standard of conduct on which they can base a "common law recoupment" cause of action.

Several courts have held that the Farm Credit Act, its regulations and accompanying policy statements do not create duties that can support an action based on state common law theories. Mendel, supra; Overvaag v. Production Credit, No. 86-4049, Slip. Op. (D.S.D. July 8, 1987), affirmed, No. 87-5332, Slip. Op. (8th Cir. March 7, 1988); Production Credit Association v. Van Iperen, 396 N.W.2d 35, 38 (Min. App. 1986), pet for rev.denied (1987).

This type of claim is also prohibited because the Farm Credit Act and its regulations are simply guidelines and cannot be used to create a standard of conduct. Griffin v. Federal Land Bank of Wichita, 902 F.2d 22, 24 (10th Cir. 1990); Harper v. Federal Land Bank of Spokane, 878 F.2d at 1176. The Act does not create any obligation or any duty on the part of Keystone Farm Credit to the Harnishes. "The law is well settled that the regulations of the Farm Credit Act do not create any substantive duties or prohibitions". Federal Land Bank of St. Louis v. Hopman, 658 F. Supp. 92, 94 (E.D. Ark. 1987). See also, Production Credit Association v. Van Iperen, supra.

The Farm Credit Act "does not create duties or obligations but set mere statements of policy designed to guide discretion". Overvaag, Slip Op. at 3, citing Mendel, 656 F. Supp. at 1217. "It is not the business of the courts to second guess the Bank's decisions as to how best to [carry out its defined policy], so long as the Bank does not violate the terms of the statute that created it...." Miller v. Federal Land Bank of Spokane, 587 F.2d 415, 422 (9th Cir. 1978).

The Harnishes contend that by not including call provisions in the bonds sold to finance agricultural loans, the FLB violated the statute that created it, since the Farm Credit Act mandated the charging of the "lowest" reasonable rates of interest. The Farm Credit Act provides in pertinent part:

> In setting rates and charges, it

> shall be the objective to provide the types of credit needed by eligible borrowers at the lowest reasonable costs on a sound business basis taking into consideration the cost of money to the bank, necessary reserve and expenses of the bank and associations, and providing services to members.

12 U.S.C.A. Section 2016(b). In addition, the Farm Credit Administration regulations prohibited the Board from delegating its interest rate setting function and required it to review any rate plan on a continuing basis in order to make loans at the lowest cost. 12 CFR 614.4280.

From these statutory and regulatory provisions, the Harnishes argue that the FLB was under "a direct command at the highest corporate level to comply with its non-delegable duty to insure the making of 'lowest' interest rate loans" and that "the making of only low interest rate loans was the congressional purpose underlying its creation of the federal land bank system". (Defendants' brief at 25)

The FLB counters that nothing in the Federal Farm Credit Act suggests that farm credit banks have any duties to borrowers to set specific interest rates, whether or not the bonds issued to finance these loans have call provisions. The FLB contends and this court must agree that the method and manner of setting interest rates is entirely discretionary with the farm credit banks' board of directors. 12 U.S.C.A. Section 2016. "The fact that it may have been possible for [the bank] to set lower rates under different circumstances does not create a cause of action". Overvaag, No. 86-4049, Slip op.

The regulatory provisions do not create a common law duty giving rise to a right of recoupment. The court is being asked to apply these regulations in almost a negligence context and to somehow fashion a "negligence per se" finding. The court sees no basis in the law or in these regulations for a negligent loan servicing cause of action.

In light of the discussion above relating to the Consumer Protection Act and the recoupment defense, it is not necessary for the court to address plaintiff's objections to the purported "scandalous or impertinent material". Therefore, no ruling will be forthcoming on that particular aspect of the plaintiff's preliminary objections as the issue is moot.

Accordingly, we enter the following:

KEYSTONE FARM CREDIT, ACA,	:	NO. 3070-1990
Plaintiff	:	NO. 3071-1990
	:	NO. 3072-1990
v.	:	
JOHN M. HARNISH AND	:	
EVELYN M. HARNISH,	:	
Defendants	:	
	:	
and	:	
THE UNITED STATES OF	:	
AMERICA,	:	
Additional Defendant	:	

ORDER

AND NOW, this 24th day of April, 1992, upon consideration of plaintiff's preliminary objections and the briefs filed by the parties, it is hereby ORDERED AND DECREED that plaintiff's preliminary objections to defendants' new matter and counterclaim, with respect to the Unfair Trade Practices and Consumer Protection Act and the defense of recoupment, are sustained and defendants' new matter and counterclaim are dismissed with prejudice.

BY THE COURT:

LAWRENCE F. STENGEL
JUDGE

ATTEST:

Copies to: John T. Miravich, Esquire
William E. Haggerty, Esquire
United States of America
600 Arch Street
Philadelphia, PA 19105

APPENDIX B - SUPERIOR COURT OPINION ON INTERLOCUTORY APPEAL DATED MARCH 2, 1993

KEYSTONE FARM CREDIT, ACA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
JOHN M. HARNISH and	:	
EVELYN HARNISH, h/w AND	:	
THE UNITED STATES OF	:	
AMERICA	:	
	:	
APPEAL OF: JOHN M. HARNISH	:	
AND EVELYN M. HARNISH	:	NO. 01863 Philadelphia 1992

Appeal from the Order Entered April 24, 1992 in the Court of Common Pleas of Lancaster County, Civil, No. 3070 of 1990

KEYSTONE FARM CREDIT, ACA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
JOHN M. HARNISH and	:	
EVELYN HARNISH, h/w AND	:	
THE UNITED STATES OF	:	
AMERICA	:	
	:	
APPEAL OF: JOHN M. HARNISH	:	
AND EVELYN M. HARNISH	:	NO. 01864 Philadelphia 1992

Appeal from the Order Entered April 24, 1992 in the Court of Common Pleas of Lancaster County, Civil, No. 3071 of 1990

KEYSTONE FARM CREDIT, ACA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
JOHN M. HARNISH and EVELYN HARNISH, h/w AND THE UNITED STATES OF AMERICA	:	
	:	
APPEAL OF: JOHN M. HARNISH AND EVELYN M. HARNISH	:	NO. 01865 Philadelphia 1992

Appeal from the Order Entered April 24, 1992 in the Court of Common Pleas of Lancaster County, Civil, No. 3072 of 1990

BEFORE: McEWEN, CIRILLO, and BECK, JJ.

MEMORANDUM:

This appeal has been taken from an order which sustained the preliminary objections of Keystone Farm Credit, ACA, (hereinafter appellee or Keystone), to the new matter and counterclaim of John M. Harnish and Evelyn M. Harnish, (hereinafter appellants), in this mortgage foreclosure action. Appellants borrowed from the predecessor of Keystone approximately $760,000.00 over a five-year period commencing in 1976, but eventually became delinquent on the payments upon the loans to the extent that the amount owed exceeds $800,000.00. When appellee initiated mortgage foreclosure actions, appellants filed answers which included:

> NEW MATTER in which appellants presented the defense of recoupment, specifically, the claim that the obligation of appellants to appellee

should be reduced by the amount of money they lost by reason of the failure of appellee to comply with the requirement imposed upon appellee by statute to obtain the lowest possible interest rate upon the mortgages executed by appellants.

A COUNTERCLAIM based upon the asserted violation by appellee of the Consumer Protection Act, specifically, the losses sustained by appellants as a result of the unfair and deceptive acts and practices of appellee.

We have completed a careful study of the briefs and have engaged in extended and intense reflection upon the issues by reason of not only the compelling presentation of argument on behalf of appellants, but also and especially by reason of the direly critical straits into which the individual farmers of this country have been hurled by the turbulence of our national economy through recent decades. The United States Congress demonstrates its continuing concern for the woes of the people of the heartland, but the statutory designs for assistance must be matched by the appointment of dedicated officials and administrators who care about the predicament of the farmer and are vigilant to deny to the financier the percent here and the point there that lend validity to cries of exploitation, even gouging. Nonetheless, our study and research compels the conclusion that the trial court properly sustained the preliminary objections in this case. Moreover, since the distinguished Judge Lawrence F. Stengel has in a splendid opinion so thoroughly analyzed the arguments of appellant, it would purposeless for this Court to elaborate upon his discussion except to echo his plaintive declaration:

This court is not insensitive to the plight of the American farmer and, more specifically, to the plight of the Harnishes. This court does not take lightly its obligation to administer the laws of the commonwealth with justice and compassion. However, [the laws of this Commonwealth require that the preliminary objections must be sustained].

Order affirmed.

JUDGMENT

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Lancaster County be, and the same is hereby AFFIRMED.

BY THE COURT:

PROTHONOTARY

Dated: March 2, 1993

APPENDIX C - Supreme Court Per Curiam Order Denying Leave to Appeal dated July 26, 1993.

[124 M.D. 1993]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

KEYSTONE FARM CREDIT, ACA,	:	NO. 124 M.D. Allocatur
	:	Docket 1993
Respondent	:	
	:	
v.	:	Petition for Allowance
	:	of Appeal from the
PETITION OF: JOHN M.	:	Superior Court
HARNISH and EVELYN M.	:	
HARNISH, Husband and Wife,	:	
and THE UNITED STATES OF	:	
AMERICA,	:	
	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 26th day of July, 1993, the Petition for Allowance of Appeal is hereby Denied.

A TRUE AND CORRECT COPY
ATTEST: 07/27/93

_____
ASST. CHIEF CLERK

APPENDIX D-1 - Court of Common Pleas of Lancaster County, Pennsylvania Granting Summary Judgment in Favor of Defendants Dated November 8, 1994

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

KEYSTONE FARM CREDIT, ACA NO. 3070 - 1990
3071 - 1990
v. 3072 - 1990

JOHN M. HARNISH and EVELYN M. HARNISH and THE UNITED STATES OF AMERICA

ORDER

AND NOW, this 8th day of November, 1994, upon consideration of the motion for summary judgment filed on behalf of Keystone Farm Credit, ACA, the briefs filed by the parties and oral argument of counsel, it is hereby ORDERED that summary judgment be granted in favor of Keystone Farm Credit, ACA and against John M. Harnish and Evelyn M. Harnish, husband and wife, in each of the three cases captioned above. Judgment shall be entered as follows:

1. In civil action 3070-1990, in the amount of $34,837.01, with interest computed on a daily basis at the amount of $8.955 per day from November 1, 1993 until the date of payment of this amount;

2. In civil action 3071-1990, in the amount of $26,182.09, with interest computed on a daily basis at the amount of $3.256 per day from November 1, 1993 until the date of payment of this amount; and

3. In civil action 3072, in the amount of $982,909.38,

with interest computed on a daily basis at the amount of $125.141 per day from November 1, 1993 until the date of payment of this amount.

This court finds there to be no genuine issue as to any material fact in this case and, therefore, summary judgment is appropriate under Pa. R.C.P. 1035. Plaintiff is entitled to judgment against John M. Harnish and Evelyn M. Harnish, husband and wife, as a matter of law. Judgment shall be entered in the amounts set forth above in favor of Keystone Farm Credit, ACA, and against John M. Harnish and Evelyn M. Harnish, husband and wife.

BY THE COURT

LAWRENCE F. STENGEL
JUDGE

ATTEST:

APPENDIX D-2 - Trial Court Opinion Dated March 10, 1995

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

KEYSTONE FARM CREDIT	:	NO. 3070-1990
	:	3071-1990
V.	:	3072-1990
JOHN M. HARNISH and	:	
EVELYN M. HARNISH	:	

OPINION

BY: STENGEL, J., MARCH 10, 1995

This is a mortgage foreclosure action brought by Keystone Farm Credit against John M. and Evelyn M. Harnish. This proceeding actually encompasses three different civil actions all relating to mortgage foreclosures on farm property owned by defendants. The Harnishes have defaulted on loans secured by mortgages held by Keystone Farm Credit and owe Keystone Farm Credit in excess of $1,000,000.00.

On November 8, 1994, this court granted Keystone Farm Credit's motions for summary judgment. Defendants appealed. This opinion, in support of the court's order of November 8, 1994, is written pursuant to Pennsylvania Rule of Appellate Procedure 1925(b).

In response to Keystone Farm Credit's motions for summary judgment, the Harnishes raised two issues. First, defendants claimed they had a new defense under the Agricultural Credit Act of 1987, which amended the Farm Credit Act. Second, the Harnishes claimed they did not agree

with Keystone Farm Credit's calculation of their debt.

With respect to the new defense, the Harnishes claimed Keystone Farm credit failed to give 45 days' notice that they could file an application pursuant to the 1987 Amendments to restructure their loans. They claim they never received notice, either written or oral, and that this defense bars foreclosure.

This new defense under the 1987 Amendments in invalid for three reasons. First, the defense is waived because it was not raised in the pleadings filed by the Harnishes. Rule 1032 of the Pennsylvania Rules of Civil Procedure provides: "A party waives all defenses and objections which are not presented either by preliminary objection, answer or reply,..."

Further, defenses not raised in new matter in accordance with the Rules are waived. Iorfida v. Mary Robert Realty Co.,Inc., 372 Pa. Super. 170, 176, 539 A.2d 383, 386 (1988), appeal denied, 520 Pa. 576, 549 A.2d 136 (1988). While Rule 1030 provides a list of defenses which must be raised in new matter, courts have additionally recognized that the failure to give written statutory notice is a matter of affirmative defense which must be pled by the defendant in new matter. See, Yurechko v. County of Allegheny, 430 Pa. 325, 329, 243 A.2d 372, 375-76 (1968) (failure to give notice to defendant as required by statute is an affirmative defense which must be raised by the defendant in its answer under new matter); Zack v. Borough of Saxonburg, 386 Pa. 463, 473-74, 126 A.2d 753 (1956) (same).

The Harnishes had over four years to raise this defense and failed to do so. Defendants have, therefore, waived any defense based on the Farm Credit Act or the 1987 Amendments.

Second, the Harnishes' new defense under the 1987 Amendments is barred by law of the case. The doctrine of the law of the case provides that when an appellate court has considered and decided questions submitted to it on appeal, on remand of that appeal, the trial court is bound by the appellate court's ruling. Filanowski v. Zoning Board of Adjustment, 439

Pa. 360, 363, 266 A.2d 670, 672 (1970).

The Harnishes argue that a violation of the Farm Credit Act or its amendments can act as a bar to bringing a foreclosure action when the plaintiff is a farm credit entity. This court in a previous opinion stated that the Farm Credit Act provides guidelines to the farm credit entity and does not form the basis of a defense to a mortgage foreclosure action. The Superior Court adopted this court's opinion and, in effect, held that there is no right under the Farm Credit Act to raise a defense to interfere with a state mortgage foreclosure action. Therefore, this issue was decided by the Superior Court when it adopted this court's opinion. The issue cannot, therefore, be relitigated based upon the law of the case.

Finally, the law is well settled, and this court previously ruled, that no cause of action exists under the Farm Credit Act and its amendments. The Farm Credit Act does not state that the Act can be raised as a defense in a foreclosure proceeding nor have courts recognized that the 1987 Amendments provide a borrower with an equitable defense to a mortgage foreclosure action. See, Speck v. Federal Land Bank of Omaha, 494 N.W. 2d 628 631 (S.D. 1993); Federal Land Bank of Spokane v. Wright, 120 Idaho 32, 813 P.2d 371, 374 n.5 (Ct.App. 1991). As such, defendants' proposed defense is legally invalid.

With respect to the disputed amount owed, Keystone Farm Credit has provided the court with a detailed affidavit of the accurate amounts owed. It is the debtor's burden in opposition to a motion for summary judgment to come forward with direct evidence of the mortgage holder's miscalculation of the debt owed, rather than conclusory allegations that the mortgage holders' calculations are inaccurate. See, New York Guardian Mortgage Corp. v. Dietzel, 362 Pa.Super. 426, 429, 524 A.2d 951, 952-53 (1987). Defendants have not met this burden.

The Harnishes argue that, although over four years have passed since the institution of these actions, they have had no opportunity to take discovery from Keystone Farm Credit

regarding the debt amount. A party who seeks additional time to proceed with discovery in opposition to a motion for summary judgment must establish both the materiality of the discovery he seeks and must show that he acted with due diligence with regards to obtaining the discovery. Kerns v. Methodist Hospital, 393 Pa.Super. 533, 545-46, 574 A.2d 1068, 1074 (1990). No reasonable excuse was offered to the court for the Harnishes' failure to conduct discovery on the issue of calculations of the debt and the court found defendants had failed to act with due diligence with regard to obtaining this discovery.

The Harnishes, therefore, failed to meet their burden to provide any factual basis to suggest Keystone Farm Credit miscalculated their debt.

Summary judgment is proper in a mortgage foreclosure action even if defendants refuse to admit or specifically deny the amount of the indebtedness, if they have admitted that they are in default and the amount of the indebtedness can be established through other means. Landau v. Western Pennsylvania National Bank, 445 Pa. 217, 225-26, 282 A.2d 335, 340 (1971). Because the Harnishes admitted that they failed to repay their loans and because they had no valid defenses to excuse the nonpayment and because they failed to come forward with direct evidence of Keystone Farm Credit's miscalculation of the debt owed, a monetary judgment on the mortgage foreclosure actions in favor of Keystone Farm Credit was proper.

Accordingly, we enter the following:

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

KEYSTONE FARM CREDIT	:	NO. 3070-1990
	:	3071-1990
V.	:	3072-1990
JOHN M. HARNISH and	:	
EVELYN M. HARNISH	:	

ORDER

AND NOW, this 10th day of March, 1995, this court submits this opinion in support of the court's order of November 8, 1994, pursuant to Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure.

BY THE COURT:

LAWRENCE F. STENGEL
JUDGE

ATTEST:

Copies to: John J. Miravich, Esquire
David S. Brady, Esquire

APPENDIX E - Superior Court Opinion dated August 14, 1995

KEYSTONE FARM CREDIT, ACA IN THE SUPERIOR COURT OF PENNSYLVANIA

v.

JOHN M. HARNISH AND EVELYN M.HARNISH, H/W AND THE UNITED STATES OF AMERICA NO. 4262 Philadelphia 1994 NO. 4263 Philadelphia 1994 NO. 4264 Philadelphia 1994

APPEAL OF: JOHN M. HARNISH AND EVELYN M. HARNISH, H/W

Appeal from the JUDGMENT entered November 8, 1994 in the Court of Common Pleas, Civil Division, Lancaster County, at No. 3070 of 1990

BEFORE: CAVANAUGH, CIRILLO and HESTER, JJ.

MEMORANDUM:

These consolidated appeals are from an order which granted summary judgment in three civil actions in favor of plaintiff-appellee Keystone Farm Credit, ACA ("Keystone"). We affirm.

In July of 1990, Keystone filed three mortgage foreclosure actions against John and Evelyn Harnish ("Harnishes"), alleging that the Harnishes defaulted on loans to which Keystone held mortgages. The Harnishes had originally borrowed the money for use on their farm.

Following the filing of amended complaints by Keystone, the Harnishes filed answers with new matter and counterclaims. Specifically, they alleged that Keystone had violated the Farm Credit Act[1] and the Unfair Trade Practices and Consumer Protection Law.[2] Keystone filed preliminary objections to the new matter and counterclaims, which the trial court granted, dismissing the new matter and counterclaims with prejudice. On appeal, this court affirmed. The Harnishes' petition for allowance of appeal to the supreme court was denied. Thereafter, Keystone moved for summary judgment, which was granted by the trial court. This appeal followed.

The Harnishes have raised the following issues for our review:

I. Where the provisions of the Farm Credit Act [12 U.S.C. §2201 et seq.] are incorporated by reference into the contract between defendant mortgagors and plaintiff mortgagees, and where this fact was not plead, raised or argued by the parties nor addressed by the courts on an earlier interlocutory appeal, is it just and within the sound discretion

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[1] 12 U.S.C. §2001 et seq.

[2] 73 Pa. C.S.A. §201-1 et seq.

of the Superior Court to reverse the grant of summary judgment motions and remand the matter to permit the defendants to amend their answers, reinstate the portion of their defenses relating to the contract theory and pursue their contract remedies by way of affirmative defenses to plaintiff's foreclosure actions?

II. Where it is shown that: (1) defendants answer denied facts plead by plaintiff to join the issues and leave plaintiff to its proofs, and such issues have not been the subject of a court opinion or findings of fact by the trial court and (2) defendants filed affidavits in opposition to summary judgment, did the trial court err in granting

> summary judgments for plaintiffs and in finding there was no genuine issue of material fact?

When reviewing the grant of summary judgment, our scope of review is plenary. American States v. Maryland Casualty., 427 Pa. Super. 170, 180, 628 A. 2d 880, 885 (1993).

> [A] motion for summary judgment may be granted only if "the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In passing on a motion for summary judgment, this Court will view the record in the light most favorable to the non-moving party...Summary judgment is appropriate only in those cases which are free from doubt.

Dublin by Dublin v. Shuster, 410 Pa. Super. 1, 5, 598 A.2d 1296, 1298 (1991).

> Once a motion for summary judgment is made and is properly supported, however, the nonmoving party may not simply rest upon the mere allegations or

denials in his or her pleadings. Pa. R.C.P. 1035(d). In such a case, Rule 1035(d) requires that "by affidavits or as otherwise provided in this rule, [the non-movant] must set forth specific facts showing that there is a genuine issue for trial." The purpose of Rule 1035(d) "is to assure that the

> motion for summary judgment may "pierce the pleading" and to require the opposing party to disclose the facts of his claim or defense.'" Roland v. Kravco, Inc., 355 Pa. Super. 493, 501, 513 A.2d 1029, 1034 (1986) (quoting) Goodrich Amran [sic] 2nd §1035(d): 5 at 460 (1976) (emphasis added by Roland court), appeal denied, 517 Pa. 599, 535 A.2d 1058 (1987). Thus, once the motion for summary judgment has been properly supported, the burden is upon the non-movant to disclose evidence that is the basis for his or her argument resisting summary judgment. Id. at 501, 513 A.2d at 1034.

Fiffick v. GAF Corp., 412 Pa. Super. 261, 264-65, 603 A.2d 208, 210 (1992), quoting, Samarin v. GAF Corp., 391 Pa. Super. 340, 346-47, 571 A.2d 398, 402 (1989).

With respect to the first issue, the Harnishes contend that the trial court erred in granting summary judgment because they have an affirmative defense under the Farm Credit Act in that (1) Keystone failed to provide notice of a loan restructuring program; and (2) Keystone charged excessive interest rates. In disposing of Keystone's motions

for summary judgment, the trial court concluded that the Harnishes' notice defense was waived because they failed to raise it in new matter, and that their defenses were barred under the law of the case doctrine.

We will first examine the Harnishes' contention that the trial court erred in concluding that their notice claim has been waived.

> It is fundamental that this court will not consider on appeal questions which were not raised by the pleadings. 16 Standard Pennsylvania Practice §87:1 (1983).
>
> • • •
>
> Affirmative defenses not raised in new matter in accordance with Pa. R.C.P. 1030 are waived pursuant to Pa. R.C. P. 1032. Rule 1030 lists but does not limit what is includable as new matter. In essence, new matter is anything other than a denial, setoff, or counterclaim. Anderson, Pennsylvania Civil Practice §1030.4 (1969).

Iorfida v. Mary Robert Realty Co., Inc., 372 Pa. Super. 170, 175-76, 539 A.2d 383, 386 (1988). "An allegation that a claimant has failed to meet the statutory requirement of notice must be set forth as an affirmative defense under new matter in answer to the complaint." Yurechko v. County of Allegheny, 430 Pa. 325, 329, 243 A.2d 372, 375-76 (1968).

Here, the Harnishes did not raise the notice defense in their answers and new matter to Keystone's amended complaints. Moreover, this defense was not raised until four

years after the complaints were filed. Only when new counsel was retained by the harnishes did the notice defense suddenly appear. The Harnishes concede that this defense was first raised by present counsel, but attempt to excuse former counsel's omission as harmless in view of case law from other jurisdictions which only very recently found merit with this defense. We find no merit to this suggestion. The Harnishes voluntarily retained their former counsel and were thus bound by his stewardship. The notice defense was not raised in new matter, as required, and is thus, waived.

We now turn to the Harnishes' second allegation with respect to this issue: that the trial court erred in concluding that their defenses under the Farm Credit Act are barred under the law of the case doctrine.

> The doctrine of "law of the case" provides that where an appellate court has considered and decided a question on appeal, that court will not, in a subsequent appeal of another phase of the same case, reverse its previous ruling, even though convinced it was erroneous. Delaware River Port Authority v. Pennsylvania Public Utility Commission, 408 Pa. 169, 173-177, 182 A.2d 682, 684-85 (1962).

Farber v. Engle, 106 Pa. Cmwlth. 173, ---n.5, 525 A.2d 864, 866 n.5 (1987); See also Ashbaugh v. Ashbaugh, 426 Pa. Super. 589, 627 A.2d 1210 (1993) ("The law of the case doctrine 'means that whatever is once irrevocably established as the controlling legal rule of decision between the same parties in the same case continues to be the law of the case.'").

As noted supra, the trial court, in ruling on Keystone's preliminary objections, dismissed the Harnishes' new matter and counterclaims with prejudice. On appeal, this court affirmed, adopting the trial court's resolution of the issues presented by the Harnishes. In granting Keystone's preliminary objections, the trial court specifically concluded that the Farm Credit Act does not create any obligation or duty on the part of Keystone to the Harnishes, that the Act serves as a guideline and does not create either a standard of conduct or any substantive duty or prohibitions, and finally, that the Act does not create duties that can support an action based on state common law theories. In view of the broad holding of the trial court that the Farm Credit Act cannot serve as a basis for a defense in these actions, and this Court's adoption of the trial court's opinion, we are foreclosed, under the doctrine of law of the case, from reversing our previous ruling and allowing a defense based upon the Farm Credit Act. As such, this issue cannot serve as a basis for reversing the trial court's entry of summary judgment.[3]

In their second issue, the Harnishes contend that genuine issues of fact exist which preclude the entry of summary judgment, in that they have controverted, by testimonial affidavit, the amount owed to Keystone. A review of the record, however, reveals that while Keystone has submitted an affidavit which sets forth both the amount owed and detailed calculations of how this amount was arrived at, the Harnishes' affidavit has only generally alleged that

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[3] We note that the trial court also concluded, one again, on the merits, that the defenses raised by the Harnishes under the Farm Credit Act are invalid. Because we have already concluded that the law of the case doctrine is applicable herein, we need not examine the merits of the Harnishes' defenses raised under the Act.

Keystone's calculations are inaccurate. The Harnishes contend that they cannot be more specific as to the amount owed to Keystone because they have not had the opportunity to conduct discovery regarding the amount of the debt. We find no merit to such a contention. The Harnishes have been involved in these proceedings for over five years and the loans at issue had been obtained by them several years before the advent of this litigation. We cannot fathom how the Harnishes are so unaware of the amount due that they cannot proffer more than a general denial of the debt figure advanced by Keystone. See New York Guardian Mortgage Corp. v. Kietzel, 362 Pa. Super. 426, 524 A. 2d 951, (1987) (general denial by party that they are without information of the amount due is considered an admission of those facts; apart from lender, borrower is only other party who would have sufficient knowledge upon which to base a specific denial). Additionally, the Harnishes have failed to demonstrate that they acted with diligence, in the five years since these actions were filed, in attempting to obtain discovery of the amount owed. See Kerns v. Methodist Hospital, 393 Pa. Super. 533, 574 A.2d 1068(1990) (where there has been adequate time for discovery, party opposing summary judgment must establish both materiality and due diligence before being allowed further discovery). As such, the Harnishes' final issue is without merit, and we affirm the order of the trial court which granted summary judgment in favor of Keystone.

Order affirmed.

KEYSTONE FARM CREDIT , ACA	:	IN THE SUPERIOR
	:	COURT OF
	:	PENNSYLVANIA
v.	:	
JOHN M. HARNISH, ET AL.	:	NO. 4262 PHL 94
	:	NO. 4263 PHL 94
APPEAL OF: JOHN M. HARNISH,	:	NO. 4264 PHL 94
ET AL.	:	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Lancaster County be, and the same is hereby Affirmed.

BY THE COURT:

Prothonotary

Dated: August 14, 1995

APPENDIX F - Pennsylvania Supreme Court Per Curiam Denial of Leave to Appeal Dated February 13, 1996.

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

KEYSTONE FARM CREDIT, ACA **NO. 477 M.D. ALLOCATUR DKT. 1995**

V.

JOHN M. HARNISH AND EVELYN M. HARNISH AND THE UNITED STATES OF AMERICA

PETITION OF JOHN M. AND EVELYN M. HARNISH **Petition for Allowance of Appeal from the Superior Court**

ORDER

PER CURIAM:

AND NOW, this 13th day of February, 1996, the Petition for Allowance of Appeal and the application for stay are denied. The Petition for Leave to File a Response to [Keystone's] Brief in Opposition is denied as moot.

ATTEST:_____

APPENDIX G-1 - Defendants' Answer with New Matter to Motions for Summary Judgment

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY PENNSYLVANIA

CIVIL ACTION - LAW

KEYSTONE FARM CREDIT, ACA **IN THE COURT OF COMMON PLEAS**

Plaintiff **LANCASTER COUNTY, PENNSYLVANIA**

v.

CIVIL ACTION - LAW

JOHN M. HARNISH and EVELYN M. HARNISH, h/w and THE **NO. 3070 of 1990**
NO. 3071 of 1990
NO. 3072 of 1990

UNITED STATES OF AMERICA **ACTION IN MORTGAGE FORECLOSURE**

Defendants

DEFENDANTS' ANSWER TO MOTION FOR SUMMARY JUDGMENT

ANSWER TO PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT

NOW COME DEFENDANTS, John M. and Evelyn M. Harnish and for their Answers to Plaintiff's Motions for Summary Judgment in each of the above captioned matters as follows:

1. ADMITTED.

2. Now come Defendants and in answer to paragraph two of the Motion for Summary Judgment neither admit nor deny the allegations therein but leave Plaintiffs to their strictest proofs.

3. Defendants admit that money were loaned but neither admit nor deny knowledge of whether the security interests represented by the various mortgages were properly

perfected according to the law and leave Plaintiffs to their strictest proofs.

4. Defendants neither admit nor deny paragraph four and leave Plaintiffs to their strictest proofs but neither admit nor deny knowledge of whether the security interests represented by the various mortgages were properly perfected according to law.

5. Defendants neither admit nor deny paragraph five, being without knowledge of same and leave Plaintiffs to their strictest proofs.

6. Denied leaving Plaintiffs to their strictest proofs and affirmatively allege new matter that Plaintiffs have no right to sue for foreclosure until they can sustain their burden to prove they have complied with all requirements of Farm Credit Act 12 U.S.C.S. 2001 et seq; further affirmatively allege that said Act sets conditions precedent to suit which Plaintiffs have not satisfied so that their Complaints in Foreclosure should be dismissed.

7. Denied and leave Plaintiffs to their strictest proofs and affirmatively allege new matter that there are numerous issues of fact upon which Defendants seek the right of discovery and cite Defendants' Affidavit in Opposition to Plaintiff's Summary Judgment Motions and the underlying complaints.

8. Deny that Rule 1035 of the Pennsylvania Rules of Civil Procedure authorize granting Summary Judgment Motions where there are issues of fact as there are in this matter and in support of such denial cite Defendants' Motion for Stay of Proceedings pending Federal court action for Declaratory Relief, Defendants' Affidavit in Opposition to Plaintiff's Summary Judgment Motions and the Memorandum in Support of Motion for Stay.

9. Denied and affirmatively allege that Defendants' Affidavit in Opposition to Plaintiff's Summary Judgment Motions together with the Defendants' Motion for Stay of Proceedings pending Federal court action for Declaratory

Relief preclude the granting of Plaintiff's Summary Judgment Motions in each case in question, as a matter of law.

10. Denied and affirmatively allege that said Memorandum totally ignores the Farm Credit Act 12 U.S.C.S. 2001 et seq. and the requirements of Plaintiffs to follow it as a condition precedent to its having a legal ability to file suit in the first place to foreclose farm loans and further affirmatively allege that Plaintiffs are under a legal disability to bring suit necessitating the dismissal of these actions.

AFFIRMATIVE DEFENSE AND NEW MATTER

I.

NOW COME DEFENDANTS JOHN M. AND EVELYN M. HARNISH and affirmatively allege new matter that Plaintiffs have failed to state a claim upon which relief can be granted within the contemplation of Pennsylvania Rule of Civil Procedure 1032 for the reason that as a condition precedent to suit under Farm Credit Act 12 U.S.C.S. 2001 et seq. §2202(b)(2) they must give Notice to Defendants before commencing foreclosure proceedings; Defendants cite in further support thereof Defendants' Memorandum in Opposition to Motion for Summary Judgment.

II.

NOW COME DEFENDANTS JOHN M. AND EVELYN M. HARNISH and affirmatively allege new matter that Plaintiffs are estopped from relying upon their Motions for Summary Judgment and their Complaints in foreclosure by virtue of their noncompliance with the federal statute upon which the relationship of lender and borrower-member based, namely that it was subject to the Farm Credit Act 12 U.S.C.S. 2001 et seq..

III.

NOW COME DEFENDANTS JOHN M. AND EVELYN M. HARNISH and affirmatively allege new matter that they have paid Plaintiff in excess of one million dollars during the course of their relationship which moneys Plaintiffs have not accounted for in the captioned action.

IV.

NOW COME DEFENDANTS JOHN M. AND EVELYN M. HARNISH and affirmatively allege new matter that prior to the loan closings in question, Plaintiff did not comply with 12 U.S.C.S. 2199(b) so as to advise Defendants that upon their request at any time during the loan payment period, Plaintiffs had to provide a review of the loans to determine if the proper interest rate was established, explain to borrowers in writing the basis for the interest rates charged, and explain to the borrowers in writing how the credit status of the borrowers could be improved to receive a lower interest rate on the loans in question during the course thereof.

V.

NOW COME DEFENDANTS JOHN M. AND EVELYN M. HARNISH and affirmatively allege new matter that their prior attorneys in this matter failed to allow sufficient personal consultation and/or a full scope examination of all proper legal defenses Defendants legitimately could interpose to Plaintiff's Complaints; and by such acts or omissions possibly severely prejudiced Defendants' case by failing to plead all such issue in such a way as to overcome Plaintiff's Preliminary Objections and open the case to discovery and trial on the merits of the appropriate defenses to the action.

WHEREFORE, Defendants pray that this Honorable Court will deny the Summary Judgment Motions of Plaintiffs and further dismiss the underlying complaints filed in these actions or in the alternative grant leave to Defendants to amend their answer to Plaintiff's Complaints.

Respectfully Submitted,

DAVID S. BRADY, ESQ.
SUP. CT. NO. 35928
OLDE ENGLISH GAP
845 SIR THOMAS COURT
HARRISBURG, PA 17109
(717) 541-4400

August 1, 1994

APPENDIX G-2 - Defendants' Affidavits in Opposition to Summary Judgment dated July 1994 and August 4, 1994.

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY
PENNSYLVANIA
CIVIL ACTION - LAW

KEYSTONE FARM CREDIT, ACA — IN THE COURT OF COMMON PLEAS
Plaintiff — LANCASTER COUNTY, PENNSYLVANIA

v.

CIVIL ACTION - LAW

JOHN M. HARNISH and EVELYN M. HARNISH, h/w and THE UNITED STATES OF AMERICA — NO. 3070 of 1990
NO. 3071 of 1990
NO. 3072 of 1990
ACTION IN MORTGAGE FORECLOSURE

Defendants

DEFENDANTS' AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

DEFENDANTS' AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT

NOW COMES JOHN M. HARNISH and for his Affidavit in Opposition to Plaintiff's Motions for Summary Judgment deposes and says as follows:

1. Defendants on information and belief assert that there is competent admissible evidence that they do not owe Plaintiff Keystone Farm Credit ACA the sums stated in Plaintiff's Complaints and Motions for Summary Judgment which evidence can be discovered among Plaintiff's files and

records of the payments and accounting documents.

2. Your deponent does swear or affirm that over the course of the years of payments to Plaintiff on the several mortgage transactions, through monthly payments, various sales of property, satisfaction of notes, bonds paid for, fees, interest and an insurance payment, the Defendants paid Plaintiff in excess of one million three hundred thousand dollars.

3. Your Deponent avers that the several mortgages executed with Plaintiff were expressly subject to the Farm Credit Act, being 12 U.S.C.S. 2001 et seq. and Defendants further believe to the best of their knowledge that Plaintiffs have not complied with the requirements of said Act.

4. Deponent swears on information and belief that Plaintiff has not accurately, properly or adequately accounted to Defendants or to this court for all of the payments which Defendants as referenced in paragraph two above.

5. Consequently, Defendants have no accurate idea or accounting from Plaintiff as to their application of the funds paid by Defendants to them over the course of the years on the various mortgages.

6. Defendants aver on information and belief that Plaintiffs are mistaken when they assert at Paragraph number three of Plaintiff's Motion for Summary Judgment and the affidavit of James R. Jonik, that on April 22, 1976 Plaintiffs loaned $162,000.00 to Defendants. Defendants received $24,000.00 pursuant to a transaction on that date.

7. Defendants affirm on information and belief that all of the mortgages they entered with the Plaintiff farm credit banks in questions were on variable interest rate mortgages, and Defendants further believe that the foreclosure actions of Plaintiff and the pleadings thereof do not account for the numerous variations in interest rates over the course of the years in question.

8. Your Deponent further swears or affirms that Plaintiff and their agents did not give or supply them with any

procedural forms or advice that Defendants could apply for loan restructuring and that they could have administrative remedies with the Farm Credit Administration if Plaintiff Keystone Farm Credit ACA were to deny restructuring after application.

9. The inducements and basis of the bargain for your deponent to enter into the mortgages with Keystone Farm Credit ACA were that as farmers they would become members of the Farm Credit System and would have a personal interest in the Bank from which they were obtaining the money, that they would actually have stock in the bank and that such mortgages were subject to all of the terms, provisions, conditions and requirements of the federal laws which set up the system.

10. Defendants invested funds in shares of stock in the Farm Credit Bank system in order to become members of the Plaintiff Federal Land Bank of Baltimore now known as Keystone Farm Credit ACA and qualify for loans and mortgages. This stock was valued at approximately five per cent of the amount borrowed, yet Plaintiffs have not accounted to Defendants for the disposition of such stock.

11. Defendant swears or affirms that Plaintiffs never advised them orally or in writing that Plaintiffs were required by the Farm Credit Act 12 U.S.C.S. 2001 et seq. to consider a loan restructuring of Defendants' loans nor of the various remedies which the Act authorized mortgagees to extend including forbearance of foreclosure, deferment of interest, reamortization, all or any one of which remedy could be calculated to enable Defendants to rehabilitate their loan status.

12. Your deponent avers that Plaintiffs did not give the written Notice required by 12 U.S.C.S. 2202a(b)(2) not later than forty-five days prior to commencing foreclosure proceedings in the manner and form, and with the necessary documentation required by such Act as a condition precedent to commencing these foreclosure proceedings.

13. Your deponent further avers on information and belief, that prior to the loan closings in question, Plaintiff did not comply with 12 U.S.C.S. 2199(b) so as to advise Defendants that upon their request at any time during the loan payment period, Plaintiffs had to provide a review of the loans to determine if the proper interest rate was established, explain to borrowers in writing the basis for the interest rates charged, and explain to the borrowers in writing how the credit status of the borrowers could be improved to receive a lower interest rate on the loans in question during the course thereof.

14. Your deponent avers on information and belief that these issues were not plead by Defendants' former attorneys, because they did not consult with Defendants prior to preparing each pleading, and were not freely available to Defendants for discussion of facts and issues in the case. When a pleading was prepared, a copy was filed with the court, served upon the opposing counsel and mailed to Defendants. There was no opportunity for Defendants to correct or make additions to the defense.

15. Upon consultation with new Counsel, Defendants were able to formulate the perspectives presented in the present pleadings. Defendants pray that this court grant them the ability to amend their answer to Plaintiffs' complaints to plead the defenses they know of in good faith.

WHEREFORE, your deponent does swear or affirm that he has read the foregoing and believes it is true to the best of his knowledge, information and belief.

_____
JOHN M. HARNISH

Subscribed and Sworn To)
Before me, a Notary Public) SS.
in the County of Dauphin,)
Commonwealth of Pennsylvania) NOTARY PUBLIC

Before me appeared this date being August 1, 1994, John M. Harnish, a person known by me to be said deponent and did swear that he has read the foregoing and affirms it is true to the best of his knowledge and belief.

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY
PENNSYLVANIA
CIVIL ACTION - LAW

KEYSTONE FARM CREDIT, ACA — IN THE COURT OF COMMON PLEAS
Plaintiff — LANCASTER COUNTY, PENNSYLVANIA

v.

CIVIL ACTION - LAW

JOHN M. HARNISH and EVELYN M. HARNISH, h/w and THE UNITED STATES OF AMERICA — NO. 3070 of 1990
NO. 3071 of 1990
NO. 3072 of 1990
ACTION IN MORTGAGE FORECLOSURE

Defendants

DEFENDANTS' COUNTER-AFFIDAVIT IN RESPONSE TO PLAINTIFF'S ADDITIONAL AFFIDAVIT ON SUMMARY JUDGMENT MOTIONS

DEFENDANTS' COUNTER-AFFIDAVIT IN RESPONSE TO PLAINTIFF'S ADDITIONAL AFFIDAVIT ON SUMMARY JUDGMENT MOTIONS

NOW COMES JOHN M. HARNISH and for his Counter-Affidavit in Opposition to Plaintiff's Motions for Summary Judgment deposes and says as follows:

1. Defendant John Harnish has read the Affidavit of James R. Jonik, Daniel Huyett and Plaintiff's Brief in support of its Summary Judgment Motion dated August 24, 1994.

2. Your deponent does swear or affirm that he filed his Affidavit in good faith and not for the purposes of delay in the matter.

3. Your Deponent avers that he did not learn about the Notice issue on the Farm Credit Act until November of 1993 when Jerrene Zimmerman supplied him with a copy of an article in Lawyers Weekly, a copy of which is attached hereto.

4. Deponent swears that his former attorneys Morgan, Walgreen by William Haggerty and his assistant Jerrene Zimmerman did not know about the defense until then or had not informed your deponent he had such defenses. Defendant's attorneys had consequently not raised your deponent's valid defenses before that time and this court's decision granting Plaintiff's Preliminary Objections had already been decided by Pennsylvania Appeals courts.

5. Near the end of November 1993 or early December, attorney Jerrene Zimmerman advised your deponent that Plaintiffs' attorneys alleged that Plaintiff had sent Defendants a copy of the Farm Credit procedures for restructuring and that she did not want to represent Defendants anymore because "Defendants were out of court".

6. Your deponent does swear and affirm that he never received the procedures and application now supplied in Plaintiff's response and further does swear or affirm that Plaintiffs never mentioned restructuring in the numerous meetings had with them.

7. Your deponent does not understand why Plaintiffs and their officers and agents in charge of the loans, including James R. Jonik never once mentioned restructuring, the application process, or any type of relief that could be afforded to Defendants through restructuring such as interest deferments, interest rate adjustment, deferment of principal or combinations of these things which are available under the Farm Credit Act.

8. Further Plaintiff never mentioned nor supplied to Defendants any analysis of the "Cost Basis" for proceeding to foreclosure versus granting restructuring remedies for a clearly distressed loan as they are required to do under the Farm Credit Act.

9. In response to paragraph twenty of James R. Jonik's Supplemental Affidavit, your Deponent does aver that Defendants' first loan was for $139,000. in 1974 for the "Case farm". That debt was the only debt outstanding as of the execution of a $162,000. mortgage on April 22, 1976.

10. Defendants received only $24,000. from proceeds of the $162,000. mortgage executed on that date (April 22, 1976) for purchase of the Lutz house. Defendants continued to pay over $1,000. dollars per month on the $139,000. mortgage and paid it off out of sales of property in 1987.

11. It is not clear from Plaintiff's Complaints and Motions for Summary Judgment in this matter where or what loans are being referred to by James R. Jonik in item number twenty of his Supplementary Affidavit as "...previous debt (including principal and interest) on another loan."

12. At item number six of his Supplementary Affidavit, James R. Jonik states that "Beginning in about 1976, the Harnishes borrowed..." etc., yet he avers at paragraph twenty that there was "previous debt".

13. Your deponent did not receive $138,000. in proceeds from the execution of the $162,000. mortgage and is unaware of how such proceeds may have been applied by Plaintiff.

WHEREFORE, your deponent does swear of affirm that he has read the foregoing and believes it is true to the best of his knowledge, information and belief.

_____
JOHN M. HARNISH

Subscribed and Sworn To)
Before me, a Notary Public) SS.
in the County of Dauphin,)
Commonwealth of Pennsylvania) _____
NOTARY PUBLIC

Before me appeared this date being August 29, 1994, John M. Harnish, a person known by me to be said deponent and did swear that he has read the foregoing and affirms it is true to the best of his knowledge and belief.

APPENDIX H - PETITION FOR LEAVE TO APPEAL FROM A SUPERIOR COURT JUDGMENT FILED
PETITION FOR LEAVE TO APPEAL

KEYSTONE FARM CREDIT, ACA	**IN THE SUPREME COURT OF PENNSYLVANIA**
Plaintiff	
v.	**CIVIL ACTION - LAW ALLOCATUR DOCKET**
JOHN M. HARNISH and EVELYN M. HARNISH, h/w and THE UNITED STATES OF AMERICA,	**APPEAL DOCKET NO. 4262 PHILADELPHIA 1994**
	NO. 3070 OF 1990- NO. 3071 OF 1990 NO. 3072 OF 1990 LANCASTER ACTION IN MORTGAGE FORECLOSURE
Defendants	**PETITION FOR LEAVE TO APPEAL FROM A SUPERIOR COURT JUDGMENT**

Appeal from the Judgment entered by Superior Court of Pennsylvania on August 14, 1995 Affirming the Trial Court's entering Summary Judgment in favor of Plaintiff

PETITION FOR LEAVE TO APPEAL

The Petition of John M. Harnish and Evelyn M. Harnish by and through their attorney, David S. Brady respectfully

represent:

1. Opinions: (a) Keystone Farm Credit, ACA v. John M. Harnish and Evelyn M. Harnish, _____ Sup. Ct. _____, _____ A. 2d (1995). The Opinion and Order of the Superior Court of Pennsylvania dated August 14, 1995 is appended hereto and marked as Exhibit "A". Attached as Exhibit "A-1" is the judgment of the Superior Court.

(b) Keystone Farm Credit, ACA v. John M. Harnish and Evelyn M. Harnish, (Memorandum Opinion not reported.) The Memorandum Opinion and Order of the Court of Common Pleas of Lancaster County, Pennsylvania dated November 8, 1995 is appended hereto and marked as Exhibit "B". Attached and marked as Exhibit "B-1" is the Memorandum Opinion of the Lancaster Court of Common Pleas dated December denying a stay on appeal. Thereafter, the Superior Court granted a supersedeas and put the appeal on expedited basis.

2. ORDER IN QUESTION: ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of common Pleas of Lancaster County be, and the same is hereby AFFIRMED.

3. QUESTIONS PRESENTED FOR REVIEW:

I. WHERE THE PROVISIONS OF THE FARM CREDIT ACT [12 U.S.C. §2201 ET SEQ.] ARE INCORPORATED BY REFERENCE INTO THE CONTRACT BETWEEN DEFENDANT MORTGAGORS AND PLAINTIFF MORTGAGEES, AND WHERE THIS FACT WAS NOT PLEAD, RAISED OR ARGUED BY THE PARTIES NOR ADDRESSED BY THE COURTS ON AN EARLIER INTERLOCUTORY APPEAL, BUT WAS RAISED BEFORE THE TRIAL COURT PRIOR TO THE PRESENT APPEAL, IS IT JUST AND WITHIN THE SOUND DISCRETION OF THE SUPERIOR COURT TO REVERSE THE GRANT OF SUMMARY JUDGMENT MOTIONS AND REMAND THE MATTER TO PERMIT DEFENDANTS TO AMEND THEIR ANSWERS, REINSTATE THE PORTION OF THEIR DEFENSES RELATING TO THE CONTRACT THEORY AND PURSUE THEIR

CONTRACT REMEDIES BY WAY OF AFFIRMATIVE DEFENSES TO PLAINTIFF'S FORECLOSURE ACTIONS?

II. WHERE IT IS SHOWN THAT: (1) DEFENDANTS' ANSWER DENIED FACTS PLEAD BY PLAINTIFF TO JOIN THE ISSUES AND LEAVE PLAINTIFF TO ITS PROOFS, AND SUCH ISSUES HAVE NOT BEEN THE SUBJECT OF A COURT OPINION OR FINDINGS OF FACT BY THE TRIAL COURT AND (2) DEFENDANTS FILED AFFIDAVITS IN OPPOSITION TO SUMMARY JUDGMENT, DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENTS FOR PLAINTIFF AND DID THE SUPERIOR COURT ERR IN AFFIRMING SAID JUDGMENTS FOR PLAINTIFFS AND IN FINDING THERE WAS NO GENUINE ISSUE OF MATERIAL FACT?

Defendants suggest affirmative answers to both questions posed.

4. STATEMENT OF THE CASE:

This is an appeal by Petitioners, John M. Harnish and Evelyn M. Harnish, husband and wife, from the Order of the Superior Court filed August 14, 1995 affirming the Order of the Court of Common Pleas of Lancaster County, Pennsylvania, which affirmed the granting of Summary Judgments in all three foreclosure actions pertaining to the Defendants' farm property, notwithstanding the filing by Defendants of Affidavits raising questions of fact which were ignored by the Trial Court and the Superior Court on appeal.

In an earlier interlocutory appeal, the Superior Court affirmed the Trial Court's dismissal of all New Matter and affirmative defenses of Defendants, without the benefit of any testimony and without any trial on the merits of the defenses.

In that earlier appeal the issues posed by the contract theory were not addressed by the Trial Court or raised by prior counsel for Defendants.

On the remand Order by the Superior Court, Defendants procured another attorney who raised the issues on Summary Judgment arguments that the contract of the parties

incorporated by reference the full terms of the Farm Credit Act into the contract between the parties. At the hearing of argument in the trial court on the summary judgment motions, the appellants, John and Evelyn Harnish requested a stenographer to make a record of such arguments. This request was denied by the Trial Court, leaving all proceedings in the case submitted by briefs of the parties and unrecorded oral arguments by Counsel for the parties.

Defendants also alleged by New Matter in their Answer to Summary Judgment Motions which raised both questions of fact and the issue of the incorporation of the terms of the Farm Credit Act into the parties' contract. The trial court ignored this issue and the facts plead by affidavit and not responded to by Plaintiffs.

Plaintiffs claimed in argument before the Superior Court that the Defendants had not complied with the Farm Credit Act but that they, the Plaintiffs, had complied with the Act. That point is contested by Defendants. Plaintiff also argued that they did not have to comply with the Act because, they alleged, that the Act was and is meaningless in a foreclosure action. Defendants claim the Act is designed to help farmers overcome the economic factors resulting in failure of farming operations by virtue of low market prices.

The issue of the Farm Credit Act [12 U.S.C. §2201 et seq.] and its application in farm foreclosure cases is a substantial question of first impression in Pennsylvania courts. Other Circuits have ruled on this issue and have applied the Farm Credit Act as part of the basis of the bargain of the farmers having entered into a relationship as co-owners of the Farm Credit system with shares issued by the Farm Credit industry.

Defendants cited the case of Farm Credit Bank of Spokane vs. The District Court of the Third Judicial District of the State of Montana, 881 P2d 594 (Mont. 1994) which case finds that the terms of the Farm Credit Act [12 U.S.C. §2201 et seq.] and cited above are shifted to contract rights of the parties making the

mandatory terms of the Statute enforceable rights on the contract.

Defendants come now before the Supreme Court of Pennsylvania and request this court to rule that the contract issues deserve a hearing before the Trial Court at which testimony can be taken to squarely pose the contract issues where the Act itself defines contractual obligations of the Farm Credit Banks in the foreclosure setting in State Courts. These circumstances and the loss of farms throughout the Commonwealth of Pennsylvania which swallow up farm land for subdivisions and extensive damage to the farm economy, deserve a trial on the merits in the Common Pleas Court.

No record has been made in the Harnish case of any trial testimony whatsoever, notwithstanding the pendency of these cases for years during the appeal process.

The Superior Court decision on this appeal finds that the Defendants made only "generally alleged that Keystones' calculations are inaccurate..." [See Page seven of the Superior Court's decision on this appeal in "Exhibit B" attached hereto.]. However, the Defendants alleged specifically that they had paid Keystone one million point 3 dollars to Plaintiff on a total loan value of 760,000. (1.3 million dollars) This is more than a "general denial of amount due." These specific facts were deemed by the Superior Court not to be specific enough about the amount owed.

The Defendants aver that this decision by the Superior Court is error and should be reversed.

Defendants also request the affirmance of a Supersedeas on the premises of this matter. The value of the Defendants's farm land together with buildings on the tracts in question, is greater than the debt to Plaintiff, thus constituting sufficient security as a pledge of security for the outcome of this matter between Plaintiff and Defendants.

These issues posed by the case in its present posture are substantial and a deserving the issuance of a Supersedeas Order pending the findings of the Supreme Court. See

Appellants' Application for Supersedeas filed with the Superior Court and attached hereto as Defendants' Exhibit "C".

WHEREFORE, Defendants pray for leave to appeal in the Supreme Court so that substantial issues of law can be addressed by the Supreme Court and issues of fact between the parties can be the subject of a Supreme Court appellate proceeding, Defendants further pray for the continuation of the Supersedeas entered by the Superior Court, pending the final decision of the Supreme Court in the matters in question.

Respectfully Submitted,

_____

DAVID S. BRADY, ESQ.
PA BAR # 35928
1440 STONE GLEN ROAD
DAUPHIN, PA. 17018
PHONE: (717) 921-3286

September 11, 1995

APPENDIX I - Section 102 of the Agricultural Credit Act of 1987, 12 U.S.C. §2202a

SEC. 102. Restructuring distressed loans

(a) Definitions

As used in this part (other than in 2205 and 2206 of this section):

(1) Application for restructuring

The term "application for restructuring" means a written request-

(A) from a borrower for the restructuring of a distressed loan in accordance with a preliminary restructuring plan proposed by the borrower as a part of the application;

(B) submitted on the appropriate forms prescribed by the qualified lender; and

(C) accompanied by sufficient financial information and repayment projections, where appropriate, as required by the qualified lender to support a sound credit decision.

(2) Cost of foreclosure

The term "cost of foreclosure" includes-

(A) the difference between the outstanding balance due on a loan made by a qualified lender and the liquidation value of the loan, taking into consideration the borrower's repayment capacity and the liquidation value of the collateral used to secure the loan;

(B) the estimated cost of maintaining a loan as a nonperforming asset;

(C) the estimated cost of administrative and legal actions necessary to foreclose a loan and dispose of property acquired as a result of the foreclosure,

rancher, or producer or harvester of aquatic products, for any agricultural or aquatic purpose and other credit needs of the borrower, including financing for basic processing and marketing directly related to the borrower's operations and those of other eligible farmers, ranchers, and producers or harvesters of aquatic products.

(6) Qualified lender

The term "qualified lender" means-

(A) a System institution that makes loans (as defined in paragraph (5) except a bank for cooperatives; and

(B) each bank, institution, corporation, company, union, and association described in section 2074(a)(2) of this title but only with respect to loans discounted or pledged under section 2074(a) of this title.

(7) Restructure and restructuring

The terms "restructure" and "restructuring" include rescheduling, reamortization, renewal, deferral of principal or interest, monetary concessions, and the taking of any other action to modify the terms of, or forebear on, a loan in any way that will make it probable that the operations of the borrower will become financially viable.

(b) Notice

(1) In general

On a determination by a qualified lender that a loan made by the lender is or has become a distressed loan, the lender shall provide written notice to the borrower that the loan may be suitable for restructuring, and include with such notice-

(A) a copy of the policy of the lender established under subsection (g) of this section that governs the treatment of distressed loans; and

(B) all materials necessary to enable the

borrower to submit an application for restructuring on the loan.

(2) Notice before foreclosure

Not later than 45 days before any qualified lender begins foreclosure proceedings with respect to a loan outstanding to any borrower, the lender shall notify the borrower that the loan may be suitable fore restructuring and that the lender will review any such suitable loan for restructuring, and shall include with such notice a copy of the policy and the materials described in paragraph (1).

(3) Limitation of foreclosure

No qualified lender may foreclose or continue any foreclosure proceeding with respect to any distressed loan before the lender has completed any pending consideration of the loan for restructuring under this section.

(c) Meetings

On determination by a qualified lender that a loan made by the lender is or has become a distressed loan, the lender shall provide a reasonable opportunity for the borrower thereof to personally meet with a representative of the lender-

(1) to review the status of the loan, the financial condition of the borrower, and the suitability of the loan for restructuring; and

(2) with respect to a loan that is in nonaccrual status, to develop a plan for restructuring the loan if the loan is suitable for restructuring.

(d) Consideration of applications

(1) In general

When a qualified lender receives an application for restructuring from a borrower, the qualified lender shall

determine whether or not to restructure the loan, taking into consideration-

(A) whether the cost to the lender or restructuring the loan is equal to or less than the cost of foreclosure;

(B) whether the borrower is applying all income over and above necessary and reasonable living and operating expenses to the payment of primary obligations;

(C) whether the borrower has the financial capacity and the management skills to protect the collateral from diversion, dissipation, or deterioration;

(D) whether the borrower is capable of working out existing financial difficulties, reestablishing a viable operation, and repaying the loan on a rescheduled basis; and

(E) in the case of a distressed loan that is not delinquent, whether restructuring consistent with sound lending practices may be taken to reasonably ensure that the loan will not become a loan that it is necessary to place in an accrual status.

(2) Applications not required for restructuring plans

This section shall not prevent a qualified lender from proposing a restructuring plan for an individual borrower in the absence of an application for restructuring from the borrower.

(e) Restructuring

(1) In general

If a qualified lender determines that the potential cost to a qualified lender of restructuring the loan in accordance with a proposed restructuring plan is less than or equal to the potential cost of foreclosure, the qualified lender shall

restructure the loan in accordance with the plan.

(2) Computation of cost of restructuring

In determining whether the potential cost to the qualified lender of restructuring a distressed loan is less than or equal to the potential cost of foreclosure, a qualified lender shall consider all relevant factors, including-

(A) the present value of interest income and principal foregone by the lender in carrying out the restructuring plan;

(B) reasonable and necessary administrative expenses involved in working with the borrower to finalize and implement the restructuring plan;

(C) whether the borrower has presented a preliminary restructuring plan and cash-flow analysis taking into account income from all sources to be applied to the debt and all assets to be pledged, showing a reasonable probability that orderly debt retirement will occur as a result of the proposed restructuring; and

(D) whether the borrower has furnished or is willing to furnish complete and current financial statements in a form acceptable to the institution.

(f) Least cost alternative

If two or more restructuring alternatives are available to a qualified lender under this section with respect to a distressed loan, the lender shall restructure the loan in conformity with the alternative that results in the least cost to the lender.

(g) Restructuring policy

(1) Establishment

Each farm credit district board of directors shall develop a policy within 60 days after January 6, 1988, that is consistent with this section, to govern the restructuring of distressed loans. Such policy shall constitute the restructuring

policy of each qualified lender within the district.

(2) Contents of policy

The policy established under paragraph (1) shall include an explanation of-

(A) the procedure for submitting an application for restructuring; and

(B) the right of borrowers with distressed loans to seek review by a credit review committee in accordance with section 2202 of this title of a denial of application for restructuring.

(3) Submission of policy to FCA

Each district board shall submit the policy of the district governing the treatment of distressed loans under this section to the Farm Credit Administration. Notwithstanding the duty imposed by the preceding sentence, the other duties imposed by this section shall take effect on January 6, 1988.

(h) Reports

During the 5-year period beginning on January 6, 1988, each qualified lender shall submit semiannual reports to the Farm Credit Administration containing-

(1) the results of the review of distressed loans of the lender; and

(2) the financial effect of loan restructuring and liquidations on the lender.

(i) compliance

The Farm Credit Administration may issue a directive requiring compliance with any provision of this section to any qualified lender that fails to comply with such provisions.

(j) Permitted foreclosure

This section shall not be construed to prevent any

qualified lender from enforcing any contractual provision that allows the lender to foreclose a loan or

from taking such other lawful action as the lender deems appropriate, if the lender has reasonable grounds to believe that the loan collateral will be destroyed, dissipated, consumed, concealed, or permanently removed from the State in which the collateral is located.

(k) Application of section
The time limitation prescribed in subsection (b)(2) of this section, and the requirements of subsection (c) of this section, shall not apply to a loan that became a distressed loan before January 6, 1988, if the borrower and lender of the loan are in the process of negotiating loan restructuring with respect to the loan.